

---

# COURTS

by

*Nancy Saint-Paul, J.D., and John R. Wierzbicki, Jr., M.B.A., J.D., of the National Legal Research Group, Inc.*

## TOPIC SCOPE

### Scope of Topic:

This article discusses the definitions and nature of state courts and distinguishes them from other governmental bodies. The article covers the creation, organization, and classification of state courts, state court records, times and places for holding court, and the functions, powers, and duties of state courts. The article also treats the various types and classifications of jurisdiction of state courts, the doctrine of forum non conveniens used by state courts, and the effect of judicial decisions and precedents made by state courts.

### Federal Aspects:

The organization, nature, and procedures of federal courts are covered in 32-32B Am Jur 2d, Federal Courts. Federal law is discussed in this article to the extent it affects state courts.

### Treated Elsewhere:

Appellate jurisdiction, procedure, and review, **see** 4, 5 Am Jur 2d, Appellate Review

Federal courts, generally, **see** 32-32B Am Jur 2d, Federal Practice and Procedure

Grand juries, **see** 38 Am Jur 2d, Grand Jury

Judges, **see** 46 Am Jur 2d, Judges

Juries, **see** 47 Am Jur 2d, Jury

Jurisdiction of courts in criminal cases, **see** 21 Am Jur 2d, Criminal Law §§ 336-360

Injunctions against the institution or maintenance of judicial proceedings, **see** 42 Am Jur 2d, Injunctions §§ 201-237

Proof of court's jurisdiction where its judgment is asserted as res judicata or as having collateral estoppel effect, **see** 47 Am Jur 2d, Judgments § 723

Tax Court of the United States, **see** 34 Am Jur 2d, Federal Taxation

Venue, **see** 77 Am Jur 2d, Venue

## RESEARCH REFERENCES

### Annotation References:

ALR Digest: Courts

ALR Index: Court Records; Courtroom or Courthouse; Courts; Discretion of Court;

Docket and Calendar of Court; Jurisdiction; Overruled Decisions; Precedents; Term of

Court

**Practice References:**

1 Am Jur Pl & Pr Forms (Rev), Abatement, Revival, and Stay ; 8A Am Jur Pl & Pr Forms (Rev), Dismissal, Discontinuance, and Nonsuit ; 7B Am Jur Pl & Pr Forms (Rev), Courts ; 19A Am Jur Pr & Pl Forms (Rev), Pleading  
3 Am Jur Trials 553, Selecting the Forum–Plaintiff's Position; 3 Am Jur Trials 611, Selecting the Forum–Defendant's Position; 5 Am Jur Trials 1, Whom to Sue–Multiple Defendants

**Insta-Cite(R):**

Cases and annotations referred to herein can be further researched through the **Insta-Cite(R)** citation verification service. Use Insta-Cite to check citations for Bluebook styling, parallel references, prior and later history, and annotation references.

---

## I. IN GENERAL [1]

**Research References**

ALR Digest: Courts § 1

ALR Index: Courts; Judicial Officers

---

### § 1 Nature and distinctions

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

◆ Definition: A court is an organ of the government, consisting of one or more persons authorized to administer justice. 1

Although a court exercises its functions through a judge or judges, 2 it is a continuous institution regardless of changes in the personnel of its judges. 3

Whether a governmental agency is a court is determined by its organizational character, purpose, and function. 4

Although administrative bodies may hear and determine facts, and in this respect perform duties judicial in nature, they are not courts; 5 courts may be distinguished from administrative agencies in that courts are part of the judicial, whereas administrative agencies are part of the executive, branch of the government. 6 In addition, administrative agencies do not have the power to punish contempts, which is one of the inherent powers of a court. 7 Furthermore, while administrative agencies are prospectively oriented, setting down rules to be followed based on laws passed by the legislature, the function of courts is much narrower, usually addressing themselves to problems after the fact. 8

Although judges are sometimes called "the court,"<sup>9</sup> the court is a broader concept, encompassing more than merely the judge or judges of the court.<sup>10</sup> In construing a statute using the word "court," the legislative intention, as understood by the court called upon to decide the question, is controlling as to whether reference is made by the statute to a court, to a judge, or both to a court and a judge.<sup>11</sup> Whether a function referred to in a statute using either the term "court" or the term "judge" is to be performed by the court or by the judge is generally to be determined by the character of that function rather than by the word used by the statute.<sup>12</sup>

Similarly, although a court may use various kinds of officials in carrying out its administrative functions, including clerks,<sup>13</sup> sheriffs,<sup>14</sup> bailiffs,<sup>15</sup> and in certain cases, commissioners, masters, or referees,<sup>16</sup> these officials generally do not perform adjudicative functions.<sup>17</sup>

The term "court" is frequently used to refer to both the judge and the jury in a jury trial.<sup>18</sup> Where a statute uses the word "court," it is a matter of construction of the legislative intent as to whether that term refers to the judge alone or to both judge and jury.<sup>19</sup>

---

## Footnotes

Footnote 1. *Wood v Circuit Court of Warren County* (ED Tenn) 331 F Supp 1245; *Vaughan v Veasey* (Super) 50 Del 133, 125 A2d 251; *State ex rel. Kiser, Cohn & Shumaker, Inc. v Sammons*, 223 Ind 27, 57 NE2d 587; *State v Horn*, 336 Mo 524, 79 SW2d 1044; *Wagenhorst v Philadelphia Life Ins. Co.*, 358 Pa 55, 55 A2d 762.

Footnote 2. *State ex rel. Harp v Vanderburgh Circuit Court*, 227 Ind 353, 85 NE2d 254, 11 ALR2d 1108.

Footnote 3. *May v Kearney*, 145 Neb 475, 17 NW2d 448; *State ex rel. Phillips v Carter*, 186 Okla 571, 99 P2d 1025.

Footnote 4. *State ex rel. Jordan v Sims*, 134 W Va 167, 58 SE2d 650.

Footnote 5. *Rommell v Walsh*, 127 Conn 16, 15 A2d 6; *In re Kinloch*, 362 Mo 434, 242 SW2d 59.

Footnote 6. *Green v Thompson*, 17 Ariz App 587, 499 P2d 715 (holding that the Superior Court Commissioner was part of the judicial branch).

Footnote 7. *Hernreich v Quinn*, 350 Mo 770, 168 SW2d 1054.

Footnote 8. *York v Commonwealth* (Ky App) 815 SW2d 415.

Footnote 9. *State ex rel. Harp v Vanderburgh Circuit Court*, 227 Ind 353, 85 NE2d 254, 11 ALR2d 1108; *State v Horn*, 336 Mo 524, 79 SW2d 1044.

Footnote 10. *American Life Ins. Co. v Powell*, 259 Ala 70, 65 So 2d 516, app dismd 260 Ala 574, 71 So 2d 872; *Vaughan v Veasey* (Super) 50 Del 133, 125 A2d 251; *Cobb County v Campbell*, 256 Ga 519, 350 SE2d 466; *State ex rel. Harp v Vanderburgh Circuit Court*, 227 Ind 353, 85 NE2d 254, 11 ALR2d 1108; *Peisker v Chavez*, 46 NM

159, 123 P2d 726; *In re Independent Order of Sons of Italy Club Liquor License*, 161 Pa Super 448, 55 A2d 546; *Welch v Welch* (Tex Civ App Dallas) 369 SW2d 434.

Footnote 11. *American Life Ins. Co. v Powell*, 259 Ala 70, 65 So 2d 516, app dismd 260 Ala 574, 71 So 2d 872; *State v Boston*, 234 Iowa 1047, 14 NW2d 676; *Ohio Loan & Discount Co. v Benedum*, 3 Ohio Misc 1, 32 Ohio Ops 2d 124, 209 NE2d 500.

Footnote 12. *Broadfoot v Florence*, 253 Ala 455, 45 So 2d 311, appeal after remand 254 Ala 704, 48 So 2d 884; *King County v United Pacific Ins. Co.*, 72 Wash 2d 604, 434 P2d 554.

Footnote 13. *State ex rel. Steers v Criminal Court of Lake County*, 232 Ind 443, 112 NE2d 445, reh den 232 Ind 451, 113 NE2d 44.

Footnote 14. *State ex rel. Steers v Criminal Court of Lake County*, 232 Ind 443, 112 NE2d 445, reh den 232 Ind 451, 113 NE2d 44.

Footnote 15. *Fidelity Finance Co. v Harris (Cuyahoga Co)* 102 Ohio App 497, 3 Ohio Ops 2d 45, 71 Ohio L Abs 309, 126 NE2d 812.

Footnote 16. *Green v Thompson*, 17 Ariz App 587, 499 P2d 715; *Raiford v Raiford*, 193 Va 221, 68 SE2d 888.

Footnote 17. *State ex rel. Steers v Criminal Court of Lake County*, 232 Ind 443, 112 NE2d 445, reh den 232 Ind 451, 113 NE2d 44.

A state statute which authorizes a court commissioner to exercise the power of a judge with respect to traffic infraction cases is a valid exercise of the power given to the legislature by a state constitutional provision authorizing appointment of commissioners to perform subordinate judicial duties. *People v Lucas* (2nd Dist) 82 Cal App 3d 47, 147 Cal Rptr 235.

A commissioner, master, or referee appointed by a court to aid it in the adjudication of a particular case is not a court when performing the functions assigned to it, although the court may adopt its conclusion in its decision. *Hoffecker v Hoffecker*, 200 Va 119, 104 SE2d 771, 76 ALR2d 412.

Footnote 18. *Broadfoot v Florence*, 253 Ala 455, 45 So 2d 311, appeal after remand 254 Ala 704, 48 So 2d 884; *Banks v Watrous*, 134 Conn 592, 59 A2d 723, 4 ALR2d 286; *Vaughan v Veasey* (Super) 50 Del 133, 125 A2d 251; *Welch v Welch* (Tex Civ App Dallas) 369 SW2d 434.

Footnote 19. *Vaughan v Veasey* (Super) 50 Del 133, 125 A2d 251; *State v Ceja*, 53 Nev 272, 298 P 658, reh den 53 Nev 281, 2 P2d 124.

---

## **II. CREATION, ORGANIZATION, AND ABOLITION [2-7]**

### **A. Creation [2, 3]**

## **Research References**

ALR Digest: Courts §§ 214, 269

ALR Index: Courts

---

## **§ 2 Generally**

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

A state constitution may expressly provide for the establishment of a system of courts by declaring that the state's judicial power is vested in certain kinds of courts, 20 or by listing certain types of courts and providing that other courts, or other inferior courts, may be created by legislation or by law. 21

A state constitution may also vest exclusive power in the legislature to create courts, 22 and, subject to any constitutional limitation, the legislature of a state has the power to create courts, including courts not provided for in the constitution. 23 A legislature may also delegate its power to create courts to another governmental body; where it has done so, a court may not be created through local ordinance, 24 although the legislature may adopt a scheme whereby a municipality may elect to establish a municipal court by resolution. 25

---

### **Footnotes**

Footnote 20. *Porter v Calhoun County Bd. of Comm'rs*, 252 Ga 446, 314 SE2d 649.

Footnote 21. *State v Keller* (Tenn Crim) 813 SW2d 146; *Kelly v State* (Tex Crim) 724 SW2d 42; *Woodmansee v Smith*, 129 Vt 284, 276 A2d 617, habeas corpus den 130 Vt 383, 296 A2d 182.

The state constitution authorizes the legislature to establish municipal, police, or mayor's courts and to specify the method by which those judges must be selected. *Hubby v Carpenter*, 177 W Va 78, 350 SE2d 706.

Footnote 22. *Lee v State*, 183 Misc 615, 49 NYS2d 836; *Behrle v Beam*, 6 Ohio St 3d 41, 6 Ohio BR 61, 451 NE2d 237 (not followed on other grounds by *M&T Constr. & Excavating, Inc. v Koe-Krompecher* (Ohio App, Gallia Co) 1991 Ohio App LEXIS 5868); *Kelly v State* (Tex Crim) 724 SW2d 42; *Hubby v Carpenter*, 177 W Va 78, 350 SE2d 706.

Footnote 23. *Woodmansee v Smith*, 129 Vt 284, 276 A2d 617, habeas corpus den 130 Vt 383, 296 A2d 182.

Footnote 24. *Medlen v State* (La) 418 So 2d 618; *State ex rel. Boston Heights v Petsche* (Summit Co) 27 Ohio App 3d 106, 27 Ohio BR 136, 499 NE2d 1250, app dismd.

Footnote 25. *Twigg v Aberdeen Municipal Court* (Wash App) 50 Wash App 594, 749

---

### § 3 De facto courts

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

◆ Definition: When a court is organized under color of law, that is, when its creation is authorized by law but the proceedings creating it are irregular or defective, it is a de facto court. 26 The judgments and proceedings of such a de facto court are valid 27 and are not open to collateral attack. 28

---

#### Footnotes

Footnote 26. *Tumbs v State*, 290 Ark 214, 718 SW2d 105.

As to de facto judges, see 46 Am Jur 2d, Judges §§ 242-247.

Footnote 27. *Watson v State*, 291 Ark 358, 724 SW2d 478, reh den 291 Ark 371A, 727 SW2d 383, post-conviction proceeding 295 Ark 616, 752 SW2d 240.

Footnote 28. *Walker v Arkansas Dep't of Human Services*, 291 Ark 43, 722 SW2d 558; *Tumbs v State*, 290 Ark 214, 718 SW2d 105.

The conviction of a criminal defendant who was convicted in an invalidly created department of a court was allowed to stand where the defendant conceded that the judge had de facto authority. *In re Application of Eng*, 113 Wash 2d 178, 776 P2d 1336.

### B. Organization [4, 5]

#### Research References

ALR Digest: Courts

ALR Index: Courts

---

### § 4 Generally

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

A state is generally free to provide for any system of courts as it chooses 29 and to reorganize its system of courts. 30 The power to organize courts also generally includes the power to establish judgeships in the courts. 31

---

## Footnotes

Footnote 29. *Tumey v Ohio*, 273 US 510, 71 L Ed 749, 47 S Ct 437, 5 Ohio L Abs 159, 5 Ohio L Abs 185, 50 ALR 1243.

Footnote 30. *County of Allegheny v Commonwealth*, 517 Pa 65, 534 A2d 760, motion den 534 Pa 8, 626 A2d 492 (holding that the state may require its judicial system to be unified, so that judicial resources and staffing is proportionately similar in all the courts).

The state supreme court's order appointing the overseer and his directive were consistent with the court's statutory authority to alter the duties of president judges, as well as the court's general supervisory and administrative authority over the unified judicial system. In re *Blake*, 527 Pa 456, 593 A2d 1267, later proceeding (CA3 Pa) 953 F2d 68.

Footnote 31. *State ex rel. Madden v Crawford*, 207 Or 76, 295 P2d 174.

---

## § 5 Regulation of jurisdiction; establishment of territorial limits

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

Subject to any constitutional limitation, 32 the legislative power to organize courts includes the power to regulate their jurisdictions. 33 The legislature may establish and change the limits of a court's territorial jurisdiction, 34 in the absence of a state constitution prescribing the establishment of territorial divisions for jurisdictional purposes. 35 The legislature generally also may divide established courts. 36

Where the state constitution itself divides the state into judicial districts, establishes the territorial limits of each district, and also provides specifically for the manner in which the districts may be rearranged by the legislature, the legislature may not validly change the territorial jurisdiction of a district except in the manner prescribed by the constitution. 37

---

## Footnotes

Footnote 32. *Godchaux Sugars, Inc. v Ockman*, 225 La 599, 73 So 2d 577 (the legislature is powerless to abridge or enlarge the jurisdiction conferred upon certain courts by the constitution).

Footnote 33. *Tumey v Ohio*, 273 US 510, 71 L Ed 749, 47 S Ct 437, 5 Ohio L Abs 159, 5 Ohio L Abs 185, 50 ALR 1243; *Hutchison v Ross*, 262 NY 381, 187 NE 65, 89 ALR 1007, reh den 262 NY 643, 188 NE 102, 89 ALR 1023; *Rhode Island State Police Lodge No. 25 v State (RI)* 485 A2d 1245, later proceeding (RI) 544 A2d 133.

Footnote 34. *Brown v Clark*, 47 Wyo 216, 34 P2d 17.

The general assembly may vest the municipal court with jurisdiction over state misdemeanor offenses, preempting enforcement of such state criminal laws in state courts. *Kolker v State*, 260 Ga 240, 391 SE2d 391.

The grant by the constitution to the legislature of the power to change the jurisdiction of the courts includes the power to determine how many and what kinds of courts are required for the administration of justice and includes the power to fix the limits of each court's jurisdiction. *State v Keller* (Tenn Crim) 813 SW2d 146.

Footnote 35. *Tanner v Beverly Country Club, Inc.*, 217 La 1043, 47 So 2d 905.

Footnote 36. *Ex parte Jackson* (Ala) 516 So 2d 768, on remand (Ala Crim App) 516 So 2d 774, subsequent app (Ala) 516 So 2d 774; *Citizens Bank of Batesville v Estate of Pettyjohn*, 282 Ark 222, 667 SW2d 657; *Cobb County v Campbell*, 256 Ga 519, 350 SE2d 466; *Nemeth v Banhalmi* (1st Dist) 125 Ill App 3d 938, 81 Ill Dec 175, 466 NE2d 977.

There is no constitutional mandate requiring the state's judicial circuits to be substantially equal in population; the power to correct the imbalance in judicial circuits rests exclusively in the general assembly. *O'Shields v McLeod*, 257 SC 477, 186 SE2d 408.

Footnote 37. *Tanner v Beverly Country Club, Inc.*, 217 La 1043, 47 So 2d 905.

### C. Abolition [6, 7]

#### **Research References**

ALR Digest: Courts § 265

ALR Index: Courts

---

## § 6 Generally

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

In general, the power to abolish courts is generally coextensive with the power to create courts. Thus, a court created by the constitution can be abolished only by a constitutional provision, 38 and a court created by legislative act may be abolished only by another legislative act, subject to constitutional limitations. 39

In the absence of a statutory provision to the contrary, where a court is established under a statute providing for courts in districts of a specified minimum and maximum population, the growth of the district in population beyond the specified maximum does not in itself cause the court to cease to exist. 40

---

#### **Footnotes**



Footnote 38. § 9.

Footnote 39. *Neff v Board of County Comm'rs*, 166 Ohio St 360, 2 Ohio Ops 2d 261, 142 NE2d 658.

Footnote 40. *Ex parte Haley*, 202 Okla 101, 210 P2d 653, 12 ALR2d 416.

---

## § 7 By repeal of basic statute

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

A court created by a statute may be abolished by the repeal of the statute which created it; any action a court takes after its legislative abolishment is the action of a court without jurisdiction and is therefore legally void. 41 A statutory court may be abolished by a later constitutional enactment which effectively repeals its basic statute. 42

---

### Footnotes

Footnote 41. *Ft. Smith Gas Co. v Kincannon*, 202 Ark 216, 150 SW2d 968.

Footnote 42. *Porter v Calhoun County Bd. of Comm'rs*, 252 Ga 446, 314 SE2d 649 (holding that the enactment of a section of the state constitution that vested judicial power of the state exclusively in certain enumerated courts, and did not list small claims courts, effectively abolished county small claims courts that had previously been created by statute).

---

## III. CLASSIFICATION OF COURTS [8-15]

### Research References

ALR Digest: Courts §§ 214, 214.5

ALR Index: Courts

---

## § 8 Generally; courts of record

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

Courts are classified according to various criteria; for example, in all jurisdictions, courts are classified as trial courts or appellate courts. 43 A court that maintains a permanent

record of its acts and judicial proceedings is a court of record. 44 Conversely, a court that is neither required to nor does enroll for permanent memorial its acts and proceedings is not a court of record. 45 The fact that a particular court is a court of record is significant in that a court of record is afforded a strong presumption as to the veracity of its records, 46 it is presumed to have had jurisdiction of the case adjudicated by it, and cannot have its records collaterally attacked 47 except in cases of fraud 48 or with regard to defects appearing on the face of the record. 49

Although a special court created by a legislature is presumed not to be a court of record unless the legislative act declares it to be such a court, 50 the statutory designation of a court as one of record is not necessarily determinative of whether it is actually a court of record for all legal purposes. 51

---

## Footnotes

Footnote 43. *Buckman v United Mine Workers*, 80 Wyo 199, 339 P2d 398, 44 BNA LRRM 2642, 37 CCH LC ¶ 65489, reh den 80 Wyo 216, 342 P2d 236, 44 BNA LRRM 2646, 37 CCH LC ¶ 65625, stating that the function of a trial court, or court of original jurisdiction, is to determine the facts and the law in a case in the first instance, whereas an appellate court is generally a court of review, except in cases in which it has original jurisdiction or where a constitutional question is at issue.

As to juvenile courts, generally, see 47 Am Jur 2d, *Juvenile Courts and Delinquent and Dependent Children*.

As to courts-martial, see 53 Am Jur 2d, *Military and Civil Defense*.

As to admiralty courts, see 2 Am Jur 2d, *Admiralty*.

Footnote 44. *State ex rel. Davis v Achor*, 225 Ind 319, 75 NE2d 154; *In re Marriage of Case*, 18 Kan App 2d 457, 856 P2d 169, appeal after remand 19 Kan App 2d 883, 879 P2d 632; *Page v Turcott*, 179 Tenn 491, 167 SW2d 350; *Chrisman v Metropolitan Life Ins. Co.*, 178 Tenn 321, 157 SW2d 831 (disapproved on other grounds by *Howard v State*, 217 Tenn 556, 399 SW2d 738); *Brighton v Charleston*, 114 Vt 316, 44 A2d 628.

Footnote 45. *Dekalb County v Deason*, 221 Ga 237, 144 SE2d 446.

Footnote 46. *State ex rel. Nassau v Kohn (Mo)* 731 SW2d 840; *Page v Turcott*, 179 Tenn 491, 167 SW2d 350.

Footnote 47. *State ex rel. Davis v Achor*, 225 Ind 319, 75 NE2d 154; *In re Marriage of Case*, 18 Kan App 2d 457, 856 P2d 169, appeal after remand 19 Kan App 2d 883, 879 P2d 632; *Ex parte Massengale*, 67 Okla Crim 181, 93 P2d 41; *New York, N. H. & H. R.R. v Superior Court*, 83 RI 292, 115 A2d 534; *Baumgarten v Frost*, 143 Tex 533, 186 SW2d 982, 159 ALR 428; *State v Underwood*, 130 W Va 166, 43 SE2d 61.

The opinion of a court cannot be used to refute the duly entered findings upon the journal, through which the court speaks. *Weinberger v Weinberger (Summit Co)* 43 Ohio App 2d 129, 72 Ohio Ops 2d 325, 334 NE2d 514, motion overr.

Footnote 48. *Chrisman v Metropolitan Life Ins. Co.*, 178 Tenn 321, 157 SW2d 831 (disapproved on other grounds by *Howard v State*, 217 Tenn 556, 399 SW2d 738).

Footnote 49. *Page v Turcott*, 179 Tenn 491, 167 SW2d 350.

Footnote 50. *Chrisman v Metropolitan Life Ins. Co.*, 178 Tenn 321, 157 SW2d 831 (disapproved on other grounds by *Howard v State*, 217 Tenn 556, 399 SW2d 738).

A city police court was designated by statute as a court of record, requiring the judge to keep records of proceedings. *St. Matthews v Voice of St. Matthews, Inc.* (Ky) 519 SW2d 811 (superseded by statute on other grounds as stated in *Friend v Rees* (Ky App) 696 SW2d 325).

Footnote 51. *Bekurs v Bumper Serv.*, 271 Ala 110, 122 So 2d 727 (holding that a court may be considered a court of record for one purpose and not so for another purpose).

---

## § 9 Constitutional courts

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

A court whose existence is specifically provided for in the state constitution is classified as a constitutional court. 52 Generally, the legislature has no power to impair the essential nature or jurisdiction of a constitutional court. 53 However, although a court is a constitutional court, since it is a court of limited power conferred on it by the legislature, its powers may be changed by the legislature 54 and the legislature may even abolish such a court. 55

---

### Footnotes

Footnote 52. *State v Keller* (Tenn Crim) 813 SW2d 146.

Footnote 53. *Bryan v Miller*, 73 ND 487, 16 NW2d 275; *Halltown Paperboard Co. v C. L. Robinson Corp.*, 150 W Va 624, 148 SE2d 721.

Footnote 54. *In re Brereton's Estate*, 355 Pa 45, 48 A2d 868.

Footnote 55. *State v Keller* (Tenn Crim) 813 SW2d 146.

As to the abolition of courts generally, see § 6.

---

## § 10 Superior and inferior courts

[View Entire Section](#)

While a superior court is a court that may hear appeals from a result reached by a court of original jurisdiction, 56 inferior courts are those courts whose judgment and decrees may be reviewed by an appellate tribunal, whether the tribunal is the circuit court or another appellate court. 57 The distinction between superior and inferior courts is sometimes treated as tantamount to the classification of courts as of general and limited jurisdiction. 58 Inferior courts have only limited jurisdiction, and may exercise only such powers as are directly conferred by legislative action. 59 Such a court is not presumed to have had jurisdiction over a matter, but instead must have its jurisdiction affirmatively shown by the record. 60

---

## Footnotes

Footnote 56. *In re Petition of Vermeulen* (Fla App D1) 122 So 2d 318; *Bryan v Miller*, 73 ND 487, 16 NW2d 275.

The superior court did not have subject matter jurisdiction of a motion to hold the Department of Transportation in contempt on the ground that it failed to comply with an order to reinstate the respondent employee when it gave him another job title and moved him to a different location since the court must make findings of fact to support its judgment in a contempt proceeding and the superior court was sitting as an appellate court in this action and could not hear matters requiring factual findings. *North Carolina Dep't of Transp. v Davenport*, 108 NC App 178, 423 SE2d 327, motion to dismiss app den 333 NC 463, 430 SE2d 676 and mod on other grounds, affd 334 NC 428, 432 SE2d 303.

Footnote 57. *Ex parte State ex rel. Carmichael*, 251 Ala 57, 36 So 2d 457; *State ex rel. Walker v Harrington* (Sup) 42 Del 14, 27 A2d 67; *State ex rel. Gannon v Lake Circuit Court*, 223 Ind 375, 61 NE2d 168.

The juvenile court is an inferior court within the meaning of the state constitution. *Shelby County Election Com. v Turner* (Tenn) 755 SW2d 774.

Footnote 58. *Walkinshaw v O'Brien*, 130 Conn 122, 32 A2d 547; *Salitan v Dashney*, 219 Or 553, 347 P2d 974, 81 ALR2d 532.

As to the classification of courts as being of general or limited jurisdiction, generally, see § 68.

Footnote 59. *In re Jason D.*, 13 Conn App 626, 538 A2d 1073; *Bruce E.M. v Dorothea A.M.* (Del Sup) 455 A2d 866; *State ex rel. Johnson v County Court of Perry County*, 25 Ohio St 3d 53, 25 Ohio BR 77, 495 NE2d 16.

A trial court of limited jurisdiction may not entertain an action for an injunction where the value of rights asserted by the plaintiff exceeds the court's jurisdictional limits. *Parish of Jefferson v Paciera* (La) 496 So 2d 266.

The jurisdiction of a court of limited jurisdiction must clearly appear in the statute. *State*

v Uthoff, 45 Wash App 261, 724 P2d 1103, review den 107 Wash 2d 1017.

Footnote 60. State ex rel. Parsons v Bushong (Allen Co) 92 Ohio App 101, 49 Ohio Ops 245, 109 NE2d 692; Salitan v Dashney, 219 Or 553, 347 P2d 974, 81 ALR2d 532; Fentress v Pruden, 185 Va 461, 39 SE2d 240.

---

## § 11 Special courts

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

The term "special court" generally designates a separate court with special jurisdiction, such as court having jurisdiction only in juvenile matters, 61 probate matters, 62 traffic offenses, 63 tax matters, 64 housing, 65 or family and domestic cases. 66 The term also refers to a court that is exercising a special jurisdiction with which it is endowed in addition to its general jurisdiction, such as the admiralty division of a Federal District Court, 67 the juvenile division 68 or probate division 69 of a court having other jurisdiction, and small claims courts. 70

---

### Footnotes

Footnote 61. 47 Am Jur 2d, Juvenile Courts and Delinquent and Dependent Children.

Footnote 62. § 14.

Footnote 63. Johnson v Virginia, 373 US 61, 10 L Ed 2d 195, 83 S Ct 1053.

Footnote 64. Jefferson County ex rel. Grauman v Jefferson County Fiscal Court, 301 Ky 405, 192 SW2d 185.

Footnote 65. Worcester Heritage Soc., Inc. v Trussell, 31 Mass App 343, 577 NE2d 1009.

Footnote 66. In re Petition of B & F Towing & Salvage Co. (Del Sup) 551 A2d 45; Bruhn v McCready (2d Dept) 138 App Div 2d 374, 525 NYS2d 659; Scheuerman v Woronoff (RI) 459 A2d 957.

Footnote 67. 2 Am Jur 2d, Admiralty § 10.

Footnote 68. 47 Am Jur 2d, Juvenile Courts and Delinquent and Dependent Children.

Footnote 69. § 14.

Footnote 70. § 13.

---

## § 12 Local courts

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

Each state may establish local courts, such as municipal, city, and police courts. 71 These are generally courts of limited subject matter jurisdiction 72 as well as limited territorial jurisdiction. 73 However, the legislature may extend a city court's territorial jurisdiction beyond the city line. 74 The legislature may also delegate the power to create a local court to the municipal body. 75

---

### Footnotes

Footnote 71. Villanazul v Los Angeles, 37 Cal 2d 718, 235 P2d 16.

Footnote 72. State v Haar (App) 100 NM 609, 673 P2d 1342 (municipal, magistrate, and metropolitan courts); State ex rel. Slaby v Summit County Council (Summit Co) 7 Ohio App 3d 199, 7 Ohio BR 258, 454 NE2d 1379 (municipal courts).

As to limited jurisdiction, generally, see § 10.

Footnote 73. Werner v Illinois C. R. Co., 379 Ill 559, 42 NE2d 82.

Footnote 74. Chappelle v Sorenson, 11 Ill 2d 472, 143 NE2d 18; Veillon v Veillon (La App 3d Cir) 517 So 2d 941.

Footnote 75. Cabot v Thompson, 286 Ark 395, 692 SW2d 235 (holding that while the legislature granted limited authority to the city to create a municipal court, it did not grant it the authority to repeal the ordinance that established that court).

---

## § 13 Small claims courts

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

A number of states have established small claims courts, 76 whose purpose is to make quick, speedy, and inexpensive settlement of small disputes. 77 Accordingly, certain legal technicalities that may encumber an ordinary proceeding are generally dispensed with in a small claims proceeding. 78 However, the substantive law applicable in a small claims proceeding is the same as that applicable in a regular proceeding. 79

A small claims court's jurisdiction may include both contract and tort claims. 80 Its jurisdiction is limited to relatively low maximum amounts, 81 and by electing to file a claim in such a court, a plaintiff waives the right to recover an amount in excess of the

jurisdictional limits of the court. 82

There is no right to a jury trial at any point in a small claims proceeding, 83

A small claims court's jurisdiction is generally not exclusive, 84 and a party may move to remove the action to another court or division. 85

In at least one jurisdiction, parties in small claims court proceedings are not permitted to be represented by an attorney at law. 86 In another jurisdiction, however, the judge has discretion whether to permit a party to appear by counsel. 87

Additionally, in at least one jurisdiction, an appeal from a decision of a small claims court is not allowed to either party, 88 while in another it is allowed only to the losing defendant. 89 In addition, a statute may provide that, on appeal, the reviewing court should hear the appeal de novo; in such a case, the reviewing court may award damages greater than that of the jurisdiction of the small claims court. 90

There is no claim for malicious prosecution based on a small claims court action. 91

---

## Footnotes

Footnote 76. *Prudential Ins. Co. v Small Claims Court*, 76 Cal App 2d 379, 173 P2d 38, 167 ALR 820; *Interstate Bankers Corp. v Kennedy* (Mun Ct App Dist Col) 33 A2d 165; *Hibberd v Neil Huffman Datsun, Inc.* (Ky App) 791 SW2d 726.

Some jurisdictions have instead established a small claims procedure within an already existing court. *Johnson v Statewide Collections* (Wyo) 778 P2d 93.

Footnote 77. *Eloby v Superior Court of Alameda County* (1st Dist) 78 Cal App 3d 972, 144 Cal Rptr 597; *Woodson v Frankart Kings, Inc.*, 98 Misc 2d 1101, 415 NYS2d 587.

Footnote 78. *McLaughlin v Municipal Court of Roxbury Dist.*, 308 Mass 397, 32 NE2d 266.

Footnote 79. *Interstate Bankers Corp. v Kennedy* (Mun Ct App Dist Col) 33 A2d 165; *McLaughlin v Municipal Court of Roxbury Dist.*, 308 Mass 397, 32 NE2d 266.

Footnote 80. *Swanson v Best Buy Co.* (SD Iowa) 731 F Supp 914, 29 BNA WH Cas 1155, 115 CCH LC ¶ 35347 (Fair Labor Standards Act claim); *McLaughlin v Municipal Court of Roxbury Dist.*, 308 Mass 397, 32 NE2d 266.

Footnote 81. *McLaughlin v Municipal Court of Roxbury Dist.*, 308 Mass 397, 32 NE2d 266.

The party's complaint filed with the small claims court, rather than its out-of-court belief, calculation, or statement of damages, determines the amount of relief sought. *Meyers v Langley* (Ind App) 638 NE2d 875.

**Annotation:** Small claims: jurisdictional limits as binding on appellate court, 67 ALR4th 1117.

Footnote 82. Meyers v Langley (Ind App) 638 NE2d 875; Armstrong v Lowell H. Listrom & Co., 11 Kan App 2d 448, 725 P2d 540.

Footnote 83. Crouchman v Superior Court, 45 Cal 3d 1167, 248 Cal Rptr 626, 755 P2d 1075.

**Annotation:** Small claims: jury trial rights in, and on appeal from, small claims court proceeding, 70 ALR4th 1119.

Footnote 84. McLaughlin v Municipal Court of Roxbury Dist., 308 Mass 397, 32 NE2d 266; Faux v Mickelsen (Utah) 725 P2d 1372, 42 Utah Adv Rep 24.

Footnote 85. Daum v Delta Airlines, Inc., 396 Mass 1013, 487 NE2d 853.

Footnote 86. Prudential Ins. Co. v Small Claims Court, 76 Cal App 2d 379, 173 P2d 38, 167 ALR 820; Lee v Small Claims Court of Judicial Township No. 4, 46 Cal App 2d 530, 116 P2d 170.

Footnote 87. McLaughlin v Municipal Court of Roxbury Dist., 308 Mass 397, 32 NE2d 266.

Footnote 88. New Milford Block Co. v Ericson, 3 Conn Cir 1, 206 A2d 487 (criticized on other grounds as stated in Beizer v Dobrowolski (Conn Super) 1994 Conn Super LEXIS 344), holding that although nonappealable, small claims judgments and decisions may be attacked by orderly processes of law, such as a motion to open judgment or a new action, if the circumstances bring the matter within the statutory provisions.

Footnote 89. Skaff v Small Claims Court for Los Angeles Judicial Dist., 68 Cal 2d 76, 65 Cal Rptr 65, 435 P2d 825; Upson Metal Fabricators v Superior Court (4th Dist) 203 Cal App 3d 67, 251 Cal Rptr 304; Eloby v Superior Court of Alameda County (1st Dist) 78 Cal App 3d 972, 144 Cal Rptr 597 (party may also be precluded from bringing motions for new trial or to vacate the judgment).

Footnote 90. Gilbert v Moore, 108 Idaho 165, 697 P2d 1179, 27 BNA WH Cas 517, 67 ALR4th 1107.

Footnote 91. Black v Hepner (4th Dist) 156 Cal App 3d 656, 202 Cal Rptr 799.

---

## § 14 Probate courts

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

Probate jurisdiction is a special jurisdiction which is generally exercised by separate courts, <sup>92</sup> or by separate divisions of courts also exercising general jurisdiction. <sup>93</sup> Although generally probate courts are courts of limited jurisdiction, <sup>94</sup> in certain cases they have been classified as courts of general jurisdiction with respect to probate matters.



---

**Footnotes**

Footnote 92. *Barrett v Clark*, 189 Md 116, 54 A2d 128, 173 ALR 988; *In re Thomson's Estate*, 362 Mo 1043, 246 SW2d 791, 29 ALR2d 1239; *In re Estate of Way*, 379 Pa 421, 109 A2d 164.

Footnote 93. *Reedy v Reedy*, 121 Ind App 356, 98 NE2d 256; *In re Estate of Lewin*, 174 Neb 596, 119 NW2d 96; *McColloch v United States Nat'l Bank*, 207 Or 508, 297 P2d 1076.

Footnote 94. *Longshore v Homewood*, 277 Ala 444, 171 So 2d 453; *In re Knapp's Estate*, 145 Me 189, 74 A2d 217; *In re Ward's Estate*, 47 NM 55, 134 P2d 539, 146 ALR 826; *In re Dickey's Estate (Montgomery Co)* 87 Ohio App 255, 42 Ohio Ops 474, 57 Ohio L Abs 346, 94 NE2d 223, 20 ALR2d 1220; *In re Griffin's Estate*, 199 Okla 676, 189 P2d 933; *In re Cloward's Estate*, 95 Utah 453, 82 P2d 336, 119 ALR 123; *In re Watkins' Estate*, 114 Vt 109, 41 A2d 180, 157 ALR 212.

Footnote 95. *State ex rel. Parsons v Bushong (Allen Co)* 92 Ohio App 101, 49 Ohio Ops 245, 109 NE2d 692.

---

**§ 15 Courts of claims**

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

Courts of claims, which exist in a few states, 96 are in some jurisdictions full-fledged courts. 97 However, in other jurisdictions, such courts are merely advisory bodies to the legislature, which may either approve or reject their recommendations. 98

---

**Footnotes**

Footnote 96. *Farrell v State*, 317 Mich 676, 27 NW2d 135; *Siegel v State*, 138 Misc 474, 246 NYS 652; *State ex rel. Adkins v Sims*, 127 W Va 786, 34 SE2d 585, related proceeding 130 W Va 645, 46 SE2d 81 (limited *State ex rel. Vincent v Gainer*, 151 W Va 1002, 158 SE2d 145).

Footnote 97. *Jones v Young*, 257 App Div 563, 14 NYS2d 84.

Footnote 98. *State ex rel. Cashman v Sims*, 130 W Va 430, 43 SE2d 805, 172 ALR 1389.

---

**IV. PLACE AND TIME OF HOLDING COURT; RECORDS [16-24]**

## A. Place [16-19]

### **Research References**

ALR Digest: Courts §§ 265, 268

ALR Index: Courtroom or Courthouse; Term of Court

---

### **§ 16 Generally**

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

A court created within and for a particular territory is, in the absence of a constitutional or statutory provision giving it extraterritorial jurisdiction, limited in its jurisdiction to that particular territory. 99 Although there is authority for the view that if a court is held at a place not fixed by law its decision is thereby rendered void, or at least reversible, 1 particularly where the court has exercised jurisdiction beyond its territorial limits, 2 there is also authority for the view that the irregularity of holding court at a place other than that prescribed by law does not necessarily render the proceeding void or a decision reached reversible. 3

---

### **Footnotes**

Footnote 99. O'Daniel v Inter-Island Resorts, 46 Hawaii 197, 377 P2d 609, 18 ALR3d 555; Tanner v Beverly Country Club, Inc., 217 La 1043, 47 So 2d 905.

Footnote 1. O'Daniel v Inter-Island Resorts, 46 Hawaii 197, 377 P2d 609, 18 ALR3d 555; Kirkland v Archbold (App, Cuyahoga Co) 68 Ohio L Abs 481, 113 NE2d 496; State v Burford, 136 W Va 472, 67 SE2d 855.

**Annotation:** Place of holding sessions of trial court as affecting validity of its proceedings, 18 ALR3d 572.

Footnote 2. O'Daniel v Inter-Island Resorts, 46 Hawaii 197, 377 P2d 609, 18 ALR3d 555; Knight v Younkin, 61 Idaho 612, 105 P2d 456; Tanner v Beverly Country Club, Inc., 217 La 1043, 47 So 2d 905; State of Minnesota v Karp (Hamilton Co) 84 Ohio App 51, 39 Ohio Ops 96, 52 Ohio L Abs 513, 84 NE2d 76.

In a prosecution for driving while intoxicated, an order of a town court on a motion to suppress breathalyzer evidence would be vacated and the matter remitted to the town court for further proceedings, where the hearing on the motion was held in the county court building outside of the geographical limit of town and the town court could not lawfully exercise jurisdiction outside of the town. People v Shepherd, 68 NY2d 841, 508 NYS2d 173, 500 NE2d 871.

Footnote 3. Ohio Loan & Discount Co. v Benedum, 3 Ohio Misc 1, 32 Ohio Ops 2d 124, 209 NE2d 500.

A hearing could be held outside the county in which the principal action was pending, so long as the hearing was conducted in a county within the judicial district. Austin v Austin, 12 NC App 286, 183 SE2d 420.

---

## § 17 Seat of court

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

Generally, a state constitutional or statutory provision fixes the permanent physical location for the conduct of court, <sup>4</sup> such as at the county seat, <sup>5</sup> from which location the court generally may not deviate. <sup>6</sup> However, it is not improper for a court to sit at a place outside a county seat where a statute so provides. <sup>7</sup>

---

### Footnotes

Footnote 4. State v Burford, 136 W Va 472, 67 SE2d 855.

Footnote 5. Peisker v Chavez, 46 NM 159, 123 P2d 726; Peisker v Chavez, 46 NM 159, 123 P2d 726; County of Greenville v Emporia, 245 Va 143, 427 SE2d 352.

The District Court is prohibited by statute from sitting other than at the county seat within the district, where a proceeding requires evidence, testimony, or factfinding. Madison Nat'l Life Ins. Co. v Second Judicial Dist. Court, 85 Nev 6, 449 P2d 256.

Footnote 6. State v Burford, 136 W Va 472, 67 SE2d 855.

Footnote 7. Baker v Dorchester County Council (SC) 432 SE2d 468; State v Burford, 136 W Va 472, 67 SE2d 855.

District judges are to perform their judicial functions with respect to county district court matters at a single location in the county, which need not be at the county seat. Littleton v Board of County Comm'rs (Colo) 787 P2d 158.

**Annotation:** Place of holding sessions of trial court as affecting validity of its proceedings, 18 ALR3d 572 § 5.

---

## § 18 Courthouse and courtroom

[View Entire Section](#)

The responsibility for providing appropriate facilities for the court is a legislative function, 8 often delegated to the county. 9 Generally, a building designated as the courthouse is placed at the disposal of a court, and the care for the courthouse as a building is considered to be an administrative, rather than a judicial, function. 10

A "courthouse" means the permanent place for holding court, including the building, or the part thereof, appointed for the use and occupancy of the court. 11 A duty to provide a suitable and convenient place for the holding of the courts necessarily includes the duty to provide a proper and sufficient courtroom with facilities for conducting trials by jury, including an adequate and sufficient jury room and the necessary conveniences. 12 Where the court has been provided with facilities inadequate for the proper administration of justice, the court has the inherent power to compel that such facilities be provided to it. 13

Where a court shares the building with other government offices, it may be entitled to additional space within the building where it can show that the space is reasonably necessary for the court's proper and efficient operation as distinguished from being merely desirable. 14

---

## Footnotes

Footnote 8. *Hosford v State* (Miss) 525 So 2d 789; *In re Alamance County Court Facilities*, 329 NC 84, 405 SE2d 125.

Footnote 9. *In re Furnishings & Equipment for Judge, Courtroom & Personnel for Courtroom Two*, 66 Ohio St 2d 427, 20 Ohio Ops 3d 367, 423 NE2d 86; *Baker v Dorchester County Council* (SC) 432 SE2d 468.

Footnote 10. *Committee for Marion County Bar Ass'n v County of Marion*, 162 Ohio St 345, 55 Ohio Ops 205, 123 NE2d 521.

Footnote 11. *County of Greenville v Emporia*, 245 Va 143, 427 SE2d 352.

Footnote 12. *Hosford v State* (Miss) 525 So 2d 789, holding that a sufficient courtroom should: (1) enable a judge to conduct court with dignity; (2) be comfortable; (3) be free from noise that substantially interrupts court proceedings; (4) have sanitary restrooms; (5) have proper ventilation; (6) have proper heating and cooling facilities; (6) have chairs of sufficient comfort so that lawyers, parties, courtroom personnel, and jurors, who are required to sit for long periods, can do so without physical unease; and (7) have sufficient space and chairs or benches provided for spectators and press.

The requirement that court sittings be public excludes the state police barracks as a courtroom. *People v Schoonmaker*, 65 Misc 2d 393, 317 NYS2d 696.

A court facility that is too isolated from a majority of the county population is also considered inadequate. *Baker v Dorchester County Council* (SC) 432 SE2d 468.

**Annotation:** Sufficiency of courtroom facilities as affecting rights of accused, 85 ALR3d 918.

Footnote 13. § 44.

Footnote 14. State ex rel. Hottle v Board of County Comm'rs, 52 Ohio St 2d 117, 6 Ohio Ops 3d 337, 370 NE2d 462.

---

## § 19 Proceedings outside courthouse or courtroom

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

A trial, or a part of a trial, may be conducted outside the courthouse without error. 15 A valid trial may be held outside of the regularly authorized courthouse during an emergency situation, 16 such as where it is necessary for the health and safety of a party or witness. 17 In some jurisdictions, however, the improper failure to hold the trial in the courthouse may constitute reversible error. 18 However, there is authority for the view that conducting a proceeding or part of it outside the courthouse cannot constitute a ground for reversal where no prejudice results. 19

While a trial held within prison for offenses committed within that same institution may be improper where it deprives a defendant of the right to a fair and public trial and to due process and equal protection of law, 20 trial in such a location may be proper where sufficient safeguards are enacted to protect the defendant's rights. 21

A proceeding held inside the courthouse but outside of the courtroom is valid. 22

---

### Footnotes

Footnote 15. People v Maxey (1st Dist) 28 Cal App 3d 190, 104 Cal Rptr 466; Schnabel v Waters, 37 Colo App 498, 549 P2d 795; Futch v State (Fla App D3) 223 So 2d 756; Pittman v State, 196 Ga App 864, 397 SE2d 302; State v Canova (La App 4th Cir) 541 So 2d 273; Smith v State, 79 NM 450, 444 P2d 961; Ohio Loan & Discount Co. v Benedum, 3 Ohio Misc 1, 32 Ohio Ops 2d 124, 209 NE2d 500.

Judicial proceedings are not rigidly confined to the judicial complex so that adjustments cannot be made to accommodate particular exigencies. Littleton v Board of County Comm'rs (Colo) 787 P2d 158.

**Annotation:** Place of holding sessions of trial court as affecting validity of its proceedings, 18 ALR3d 572 §§ 4-6.

Footnote 16. State v Jones (Iowa) 281 NW2d 13.

Footnote 17. State v Martin, 107 Ariz 444, 489 P2d 254; People v Jenkins (1st Dist) 88 Ill App 3d 719, 44 Ill Dec 53, 410 NE2d 1145; Bates v Detroit, 66 Mich App 701, 239

The defendant in a criminal case was not denied fair and public trial by holding the trial in a church hall, after voir dire of jury was conducted in a county courthouse, where the trial was conducted in a makeshift courtroom in the church hall due to renovations being conducted at the county courthouse, where the religious environment was not so pervasive as to deny the defendant a fair trial, and where public access was not restricted during the trial and the hall was used for other secular events. *People v Knapp* (3d Dept) 113 App Div 2d 154, 495 NYS2d 985, app den 67 NY2d 945, 502 NYS2d 1038, 494 NE2d 123 and cert den 479 US 844, 93 L Ed 2d 97, 107 S Ct 158, habeas corpus den, motion gr (CA2 NY) 46 F3d 170, cert den (US) 132 L Ed 2d 818.

Under a statute authorizing trial at another place in the county if it were unsafe or inexpedient to hold court at the time and place appointed, the lower court did not err in permitting the cross-examination of a witness in a public hospital, where: the witness, 65 years old, had a heart condition and was suffering from nervous exhaustion, and her doctor advised that continued testimony in the courtroom was dangerous to her health; the public had access to the proceedings; and the defendants' right to cross-examination was not impaired. *Commonwealth v De Brosky*, 363 Mass 718, 297 NE2d 496.

Where a witness was ambulatory and able to drive, a motion to permit the witness to testify in his own residence rather than in the courtroom would be denied, even though the witness had undoubtedly sustained some physical disability. *People v Bach*, 68 Misc 2d 276, 326 NYS2d 232.

Footnote 18. *Kirkland v Archbold* (App, Cuyahoga Co) 68 Ohio L Abs 481, 113 NE2d 496.

Footnote 19. *Tischmacher v State*, 146 Tex Crim 464, 176 SW2d 188.

Footnote 20. *State v Lane*, 60 Ohio St 2d 112, 14 Ohio Ops 3d 342, 397 NE2d 1338.

Footnote 21. *Howard v Commonwealth*, 6 Va App 132, 367 SE2d 527.

Footnote 22. *State v Carraher*, 116 NH 419, 360 A2d 891; *Austin v Austin*, 12 NC App 286, 183 SE2d 420; *Commonwealth v Johnson*, 347 Pa Super 93, 500 A2d 173; *State v Mecier*, 145 Vt 173, 488 A2d 737; *Caudill v Peyton*, 209 Va 405, 164 SE2d 674.

The proper place for holding court in criminal trials is the county courthouse, and trial may be held in any part of the courthouse. *Ligon v State* (Ala Crim App) 50 Ala App 658, 282 So 2d 97.

In a prosecution for murder, the trial court properly permitted voir dire to take place in the law library, which was apparently inside the courthouse but not part of the judge's chambers, notwithstanding the accused's claim that his right to a public trial was violated, where that location helped expedite jury selection and ensured that individual questioning would not taint or influence other panel members, and where neither the press nor the public was excluded from proceedings. *Morris v State*, 302 Ark 532, 792 SW2d 288.

**Annotation:** Place of holding sessions of trial court as affecting validity of its proceedings, 18 ALR3d 572 § 3.

## B. Time [20-24]

### **Research References**

ALR Digest: Courts §§ 265, 267

ALR Index: Term of Court

7B Am Jur Pl & Pr Forms (Rev), Courts, Forms 32-34

---

### **§ 20 Generally**

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

The time for holding court may be set by statute or by the court where the time for holding court is not prescribed by law. 23 The times that the courthouse is open to the public may also be set by law. 24 In addition, the court may establish a pretrial calendar to set the time for the hearing of cases. 25

---

### **Footnotes**

Footnote 23. Callier v Trussell, 74 Ga App 143, 38 SE2d 860; Peisker v Chavez, 46 NM 159, 123 P2d 726.

Footnote 24. State ex rel. Morgan v Miller, 177 W Va 97, 350 SE2d 724 (noting that county courthouse offices must, with certain exceptions, be open to the public Monday through Saturday).

Footnote 25. State ex rel. Kennedy v District Court, 121 Mont 320, 194 P2d 256, 2 ALR2d 1050; Orlando v Doyle (Sup) 111 NYS2d 735.

---

### **§ 21 Terms and sessions of court**

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

The period during which the court is held or is open to try causes, referred to as the "term of court," may be set either by statute, 26 or by the court itself. 27 Where the duration of the term is not specified in a statute, it is presumed that there is to be one annual term of court 28 beginning on January 1 and ending on December 31 of the same year. 29

Where terms are controlled by statutory provision fixing the beginning and end of a term, the court must conduct its proceedings during the term time provided by law, unless it

convenes a special term. 30

In some jurisdictions there are no terms, or no terms for certain courts. 31 In other jurisdictions statutes provide that a term continues from the beginning of one term until the opening of the next, 32 so that there is a continuous term. 33 In still other jurisdictions there are no terms for certain matters, 34 such as probate matters. 35

---

## Footnotes

Footnote 26. *Bumpers v Wallace*, 56 NM 462, 245 P2d 383.

Legislation setting the terms of court in a county do not violate a criminal defendant's equal protection rights since the legislation is rationally related to the government's interest in moving judicial caseloads and rationing jury pools. *Henry v State*, 263 Ga 417, 434 SE2d 469, 93 Fulton County D R 3406, habeas corpus den 264 Ga 527, 449 SE2d 79, 94 Fulton County D R 3256.

Footnote 27. *People v Gould* (Colo App) 844 P2d 1273.

**Forms:** Orders extending term of court to complete trial of action. 7B Am Jur Pl & Pr Forms (Rev), Courts, Forms 32, 33.

Order adjourning extended term. 7B Am Jur Pl & Pr Forms (Rev), Courts, Form 34.

Footnote 28. *People v Gould* (Colo App) 844 P2d 1273.

Footnote 29. *Mastrocesare v Mastrocesare*, 2 Neb App 231, 507 NW2d 683, 1993 Neb App LEXIS 434.

Footnote 30. *Bradley v State*, 213 Ark 927, 213 SW2d 901; *Bumpers v Wallace*, 56 NM 462, 245 P2d 383.

The judge's failure to appear on the day fixed for commencement of the term does not necessarily cause the term to lapse. *Bradley v State*, 213 Ark 927, 213 SW2d 901.

As to special terms, generally, see § 23.

**Annotation:** Consent as ground of vacating judgment, or granting new trial, in civil case, after expiration of term or time prescribed by statute or rules of court, 3 ALR3d 1191.

Jurisdiction or power of grand jury after expiration of term of court for which organized, 75 ALR2d 544.

Footnote 31. *Ex parte Campbell*, 229 Ala 422, 157 So 675, petition den 278 Ala 114, 176 So 2d 242; *Barrett v Bender*, 334 Ill App 135, 78 NE2d 832.

Footnote 32. *Vaughan v Screeton*, 183 Ark 816, 39 SW2d 299.

Footnote 33. *Harrod v Meigs* (Ky) 340 SW2d 601.



Footnote 34. *Miller v Tatum*, 170 Ark 152, 279 SW 1002.

Footnote 35. *Wheeler v Bigheart*, 172 Okla 262, 43 P2d 1028.

---

## § 22 Effect of ending of term

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

The termination of a term while a particular case is pending may have the effect of depriving the court of jurisdiction to make certain decisions which it could have made prior to the expiration of the term. 36 For example, although during a term, a court may, for good reason, correct, modify, or vacate any of its decisions rendered during that term, 37 a court may not have such power after the term in which the decision was made has expired. 38

Some jurisdictions, however, permit a change in a decision to be made after termination of the term, 39 especially where the party fraudulently obtained the judgment or order in question. 40

The power of a court to enforce its decision is generally not limited to the term in which the decision was rendered. 41

---

### Footnotes

Footnote 36. *Kase v Kase*, 18 NJ Super 12, 86 A2d 587; *Bales v Brome*, 56 Wyo 111, 105 P2d 568.

Footnote 37. *Lake-O'-The Woods Club v Martinal*, 239 Ind 31, 154 NE2d 498.

A trial court may vacate its former judgment during the same term of court. *Mastrocesare v Mastrocesare*, 2 Neb App 231, 507 NW2d 683, 1993 Neb App LEXIS 434.

Footnote 38. *State ex rel. Clark v Rice*, 113 Ind App 238, 47 NE2d 849; *Seigle v First Nat'l Co.*, 338 Mo 417, 90 SW2d 776, 105 ALR 181; *Jones v Brinson*, 238 NC 506, 78 SE2d 334; *Bales v Brome*, 56 Wyo 111, 105 P2d 568 (holding that a court may not reinstate a dismissed case after the expiration of the term during which the dismissal occurred).

Footnote 39. *Bales v Brome*, 56 Wyo 111, 105 P2d 568.

Footnote 40. *Moeller v Moeller*, 175 Kan 848, 267 P2d 536; *Metzger v Turner*, 195 Okla 406, 158 P2d 701.

Footnote 41. *Lake-O'-The Woods Club v Martinal*, 239 Ind 31, 154 NE2d 498; *Kase v*

---

## § 23 Special terms

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

In some jurisdictions, a court may convene a special term where particular circumstances exist that make it advisable to proceed outside the ordinary term time. 42

---

### Footnotes

Footnote 42. Wilcher v State (Miss) 455 So 2d 727, cert den 470 US 1034, 84 L Ed 2d 794, 105 S Ct 1411, post-conviction proceeding (Miss) 479 So 2d 710, cert den 475 US 1098, 89 L Ed 2d 901, 106 S Ct 1501, habeas corpus proceeding (CA5 Miss) 978 F2d 872, reh, en banc, den (CA5 Miss) 981 F2d 1254 and cert den (US) 126 L Ed 2d 63, 114 S Ct 96, post-conviction proceeding, remanded (Miss) 635 So 2d 789 and (among conflicting authorities on other grounds noted in Nave v Delo (CA8 Mo) 22 F3d 802) (holding that the trial court had authority to try a criminal case in a special term); Bumpers v Wallace, 56 NM 462, 245 P2d 383.

---

## § 24 Vacation

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

Generally, the court may not render a judgment while it is in vacation unless authorized by statute. 43 However, a court may conduct a recidivism sentencing hearing and pass sentence during its vacation period. 44

---

### Footnotes

Footnote 43. Carder v Arundel Mortg. Co., 177 Ga 74, 169 SE 302, ans conformed to 47 Ga App 309, 170 SE 312.

Footnote 44. Miller v State (Miss) 492 So 2d 978.

---

## V. COURT RECORDS [25-34]

## A. In General [25-31]

### **Research References**

ALR Digest: Courts § 214

ALR Index: Court Records; Court Reporter

---

### **§ 25 Generally**

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

◆ **Definition:** The court record is the permanent account of that court's proceedings in particular cases, as well as the court's opinion or decision. 45 It is a written memorial of all the acts and proceedings in an action or suit, in a court of record, and terminates when the judgment is rendered in the cause. 46

Court records are important in the administration of justice, especially because of their evidentiary effect. 47 A court cannot be a court of record if it does not keep records. 48 There is also authority for the view that without its records, a court has no vitality. 49

While the death of a party to an action abates the action, it does not expunge the action from the records. 50

---

### **Footnotes**

Footnote 45. *United States v Taylor*, 147 US 695, 37 L Ed 335, 13 S Ct 479; *C. v C.* (Del Sup) 320 A2d 717, 84 ALR3d 581; *Baumgarten v Frost*, 143 Tex 533, 186 SW2d 982, 159 ALR 428.

The term "minutes" has been used interchangeably with the term "record." *Rae v Brunswick Tire Corp.*, 45 Ariz 135, 40 P2d 976.

**Annotation:** What constitutes a public record or document within statute making falsification, forgery, mutilation, removal, or other misuse thereof an offense, 75 ALR4th 1067.

Footnote 46. *Spangler v Spangler* (Mo App) 831 SW2d 256.

Footnote 47. *Deck v Deck*, 193 Ga 739, 20 SE2d 1, subsequent app 195 Ga 404, 24 SE2d 303.

Footnote 48. § 8.

Footnote 49. *State ex rel. Davis v Achor*, 225 Ind 319, 75 NE2d 154; *Indian Territory Illuminating Oil Co. v Ray*, 153 Okla 163, 5 P2d 383.

---

## § 26 Form and content

[View Entire Section](#)  
[Go to Parallel Reference Table](#)  
[Go to Supplement](#)

It may be provided by statute that court records must be kept in permanent form. 51 However, in the absence of a constitutional or statutory provision to the contrary, no particular formalities are generally required for the keeping of court records. 52

The court's record may include a transcript of a proceeding made by the official court reporter, 53 trial exhibits, 54 and a videotape of the court proceedings. 55

In circumstances involving the recordation of child support payments, the record is not limited to the court proceeding, but may include any recordation by the clerk of the court for payments made on the judgment. 56 Other types of records that might be in the possession of a court officer, such as records of judgments or records relating to titles in property, are not be included in the court's record. 57

A transcript of the court proceedings made by a privately contracted certified shorthand reporter is not included in the court record, 58 nor are the judge's personal notes. 59

◆ **Caution:** Parties may be charged with notice of official court records and that which may be properly entered into the court records. 60

---

## § 26 ----Form and content [SUPPLEMENT]

**Practice Aids:** Are Rule 26(c) protective orders viable against grand juries? The Ninth Circuit rejects balancing test in favor of a per se rule, 26 Golden Gate LR 1-3:183 (1996).

---

## Footnotes

Footnote 51. *Baumgarten v Frost*, 143 Tex 533, 186 SW2d 982, 159 ALR 428.

Footnote 52. *New York, N. H. & H. R.R. v Superior Court*, 83 RI 292, 115 A2d 534.

Where a court orders a clerk to enter a minute order, the judge need not sign a formal writing, for the minute order is final and all legal consequences ensue therefrom. *People v Superior Court (Brent)* (5th Dist) 2 Cal App 4th 675, 3 Cal Rptr 2d 375, 92 CDOS 373, reh den (Cal App 5th Dist) 92 CDOS 1183, 92 Daily Journal DAR 1848, review den (Cal) 1992 Cal LEXIS 1487 and review den.

Footnote 53. *State v Ross*, 208 Conn 156, 543 A2d 284, 15 Media L R 1993;  
*Schademann v Casey*, 194 Neb 149, 231 NW2d 116; *Doyle v Couch* (Okla) 806 P2d 71.

Footnote 54. *Bradley v State*, 333 Md 593, 636 A2d 999.

Footnote 55. *State ex rel. Harmon v Bender*, 25 Ohio St 3d 15, 25 Ohio BR 13, 494 NE2d 1135, 13 Media L R 1031 (superseded by statute on other grounds as stated in *State ex rel. Fostoria Daily Review Co. v Fostoria Hospital Asso.*, 32 Ohio St 3d 327, 512 NE2d 1176).

Footnote 56. *Spangler v Spangler* (Mo App) 831 SW2d 256.

Footnote 57. *C. v C.* (Del Sup) 320 A2d 717, 84 ALR3d 581.

Footnote 58. *Doyle v Couch* (Okla) 806 P2d 71.

**Annotation:** Use in state court by counsel or party of tape recorder or other electronic device to make transcript of criminal trial proceedings, 67 ALR3d 1013.

Footnote 59. *State ex rel. Martinelli v Corrigan* (Cuyahoga Co) 71 Ohio App 3d 243, 593 NE2d 364, later proceeding (Ohio App, Cuyahoga Co) 1991 Ohio App LEXIS 1851, motion den, cause dismd 61 Ohio St 3d 1425, 575 NE2d 214, reh den, motion den 62 Ohio St 3d 1411, 577 NE2d 363 and cert den 502 US 961, 116 L Ed 2d 446, 112 S Ct 427 and affd 66 Ohio St 3d 524, 613 NE2d 633.

Footnote 60. *Radcliff v County of Harrison* (Ind App) 618 NE2d 1325, superseded on other grounds (Ind) 627 NE2d 1305.

---

## § 27 Preparation

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

The preparation of the court record is generally an administrative rather than a judicial function. 61 Although the clerk of the court retains physical possession of the papers, 62 the court has ultimate control of its records and has the discretion to strike scandalous material from them. 63

There is authority for the view that the parties to the action have a duty to ensure that a record of any error will be available in the event that an appeal will be necessary, or risk waiving any complaint with respect to the error. 64 In a criminal case, the state has the duty to have trial testimony entered in the records of the court and to file a transcript following a guilty verdict. 65

---

## Footnotes

Footnote 61. *Deck v Deck*, 193 Ga 739, 20 SE2d 1, subsequent app 195 Ga 404, 24 SE2d

303 (holding that under the court's supervision, the clerk of the court is responsible for entering the court's decision accurately on the record).

Footnote 62. *Finn v McNeil*, 23 Mass App 367, 502 NE2d 557.

Footnote 63. *Lucas v Central Missouri Trust Co.*, 349 Mo 537, 162 SW2d 569; *Nadeau v Texas Co.*, 104 Mont 558, 69 P2d 586, later proceeding 104 Mont 572, 69 P2d 593, 111 ALR 874.

A statute which requires courts to destroy records of their judicial acts is invalid. *Johnson v State* (Fla) 336 So 2d 93.

Footnote 64. *Piotrowski v Minns* (Tex) 873 SW2d 368, reh'g of cause overr (May 11, 1994) (holding that a litigant who fails to request that the reporter record pretrial proceedings risks waiver of any complaint with respect to error occurring during those proceedings).

Footnote 65. *Zant v Cook*, 259 Ga 299, 379 SE2d 780.

---

## § 28 Presumption of veracity of records

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

One of the essential characteristics of a court of record is that there is a strong presumption as to the veracity of its records, which cannot be collaterally attacked, except for fraud. 66 The acts of a court of record are known by its records alone and cannot be established by parol evidence. 67 Unless the court formally corrects it, the record of a court of record is conclusive evidence of the court's dispositions stated in the record. 68

---

### Footnotes

Footnote 66. § 8.

Footnote 67. *State ex rel. Davis v Achor*, 225 Ind 319, 75 NE2d 154; *Radcliff v County of Harrison* (Ind App) 618 NE2d 1325, superseded on other grounds (Ind) 627 NE2d 1305; *State ex rel. Nassau v Kohn* (Mo) 731 SW2d 840; *State ex rel. Conran v Duncan*, 333 Mo 673, 63 SW2d 135 (criticized on other grounds by *Chesterfield v Director of Revenue* (Mo) 811 SW2d 375); *Indian Territory Illuminating Oil Co. v Ray*, 153 Okla 163, 5 P2d 383; *Strasburger v Compton* (Tex Civ App Fort Worth) 324 SW2d 951, writ ref n r e (Apr 13, 1960) and reh'g of writ of error overr (Jul 6, 1960).

Footnote 68. *State ex rel. Davis v Achor*, 225 Ind 319, 75 NE2d 154; *New York, N. H. & H. R.R. v Superior Court*, 83 RI 292, 115 A2d 534; *Strasburger v Compton* (Tex Civ App Fort Worth) 324 SW2d 951, writ ref n r e (Apr 13, 1960) and reh'g of writ of error overr (Jul 6, 1960).

As to correcting or amending the court's record, generally, see § 29.

---

## § 29 Correction or amendment; generally

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

A court may, upon its own motion or that of an interested party, <sup>69</sup> correct <sup>70</sup> or amend <sup>71</sup> its record in a civil <sup>72</sup> or criminal <sup>73</sup> case, where the record contains an incorrect entry or fails to record a substantial occurrence in the proceeding. <sup>74</sup> However, the court may not, under the guise of correcting or amending of the record, change the substance of what is correctly recorded. <sup>75</sup> Thus, while the record may be amended nunc pro tunc, <sup>76</sup> the order can only be used to place in the record evidence of judicial action that had actually been taken and cannot correct an error or supply the record with action that the court failed to make. <sup>77</sup>

Before the court may correct or amend the record, it must notify all parties who may be affected by such action. <sup>78</sup>

A court order that corrects or amends a record generally is conclusive upon another court in which the record is offered in evidence. <sup>79</sup>

---

### Footnotes

Footnote 69. *State v Cannon*, 244 NC 399, 94 SE2d 339.

Footnote 70. *Weydeveld v Weydeveld*, 100 Colo 301, 67 P2d 72; *State v Cannon*, 244 NC 399, 94 SE2d 339; *Bales v Brome*, 56 Wyo 111, 105 P2d 568.

Footnote 71. *State v Cannon*, 244 NC 399, 94 SE2d 339.

Footnote 72. *Rae v Brunswick Tire Corp.*, 45 Ariz 135, 40 P2d 976; *Weydeveld v Weydeveld*, 100 Colo 301, 67 P2d 72; *Bales v Brome*, 56 Wyo 111, 105 P2d 568.

Footnote 73. *Teasley v Commonwealth*, 188 Va 376, 49 SE2d 604 (ovrld in part on other grounds by *Council v Commonwealth*, 198 Va 288, 94 SE2d 245).

Footnote 74. *Weydeveld v Weydeveld*, 100 Colo 301, 67 P2d 72; *State v Cannon*, 244 NC 399, 94 SE2d 339.

Footnote 75. *Rae v Brunswick Tire Corp.*, 45 Ariz 135, 40 P2d 976; *Interstate Printing Co. v Department of Revenue*, 236 Neb 110, 459 NW2d 519; *Council v Commonwealth*, 198 Va 288, 94 SE2d 245; *Bales v Brome*, 56 Wyo 111, 105 P2d 568.

Footnote 76. *Rae v Brunswick Tire Corp.*, 45 Ariz 135, 40 P2d 976; *Interstate Printing Co. v Department of Revenue*, 236 Neb 110, 459 NW2d 519; *Council v Commonwealth*,

198 Va 288, 94 SE2d 245; Bales v Brome, 56 Wyo 111, 105 P2d 568.

Footnote 77. Carroll v Carroll (Ky) 338 SW2d 694; Harden v Commonwealth (Ky App) 885 SW2d 323; State v Underwood, 130 W Va 166, 43 SE2d 61.

A nunc pro tunc order does not involve the destruction of the original record, substitution of a revised record, and presentation of the revised record as if matters had been originally recorded in the revised form. First Midwest Bank/Danville v Hoagland (4th Dist) 244 Ill App 3d 596, 184 Ill Dec 250, 613 NE2d 277, app den 152 Ill 2d 557, 190 Ill Dec 887, 622 NE2d 1204.

Footnote 78. Strasburger v Compton (Tex Civ App Fort Worth) 324 SW2d 951, writ ref n r e (Apr 13, 1960) and reh'g of writ of error overr (Jul 6, 1960).

Footnote 79. State v Cannon, 244 NC 399, 94 SE2d 339.

---

### **§ 30 --Time for correction or amendment**

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

A court may correct or amend its records at any time after it has created the record. 80 Accordingly, a court may correct or amend a record at a term later than the one in which the record was completed. 81 The court may also amend or correct the record where the case is already in the appeal or review stage. 82

---

### **Footnotes**

Footnote 80. State v Old, 271 NC 341, 156 SE2d 756; Bales v Brome, 56 Wyo 111, 105 P2d 568.

Footnote 81. Council v Commonwealth, 198 Va 288, 94 SE2d 245; Bales v Brome, 56 Wyo 111, 105 P2d 568.

Footnote 82. E. C. Robinson Lumber Co. v Hazel (Mo App) 271 SW2d 610; 1000 Friends of Oregon v Land Conservation & Dev. Com., 301 Or 622, 724 P2d 805.

---

### **§ 31 --Evidence in support of motion to correct or amend**

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

On a motion to correct or amend a court record, the court may consider any relevant,



competent evidence, but must exercise great caution where the only evidence offered on which to base the order is parole evidence or the judge's memory. 83 There is also authority for the view that if an order made by the court at a previous term is not of record, it cannot be determined from only the memory of witnesses or the judges' recollection. 84

---

## Footnotes

Footnote 83. *State v Cannon*, 244 NC 399, 94 SE2d 339.

Footnote 84. *E. C. Robinson Lumber Co. v Hazel* (Mo App) 271 SW2d 610.

## B. Right to Inspect Court Records [32-34]

### Research References

ALR Digest: Courts § 214

ALR Index: Court Records; Court Reporter

---

## § 32 Generally

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

Court records are generally open to inspection by the public. 85 Members of the press have no greater right than members of the general public to inspect public court records. 86

The right of access to a judicial document begins when the document is filed. 87 The right to inspect includes the right to make copies from the record, 88 and it may also include the right to obtain official copies. 89

---

## Footnotes

Footnote 85. *Pantos v City & County of San Francisco* (1st Dist) 151 Cal App 3d 258, 198 Cal Rptr 489, 10 Media L R 1279; *Green v Drinnon, Inc.*, 262 Ga 264, 417 SE2d 11, 92 Fulton County D R 924, 20 Media L R 1359; *In re Application by John Hancock Mut. Life Ins. Co.*, 81 Misc 2d 269, 366 NYS2d 93; *In re Robertson*, 7 NC App 186, 171 SE2d 801; *Cohen v Everett City Council*, 85 Wash 2d 385, 535 P2d 801.

As to access to public records, generally, see 66 Am Jur 2d, *Records and Recording Laws* §§ 12-31.

Footnote 86. *Estate of Hearst* (2nd Dist) 67 Cal App 3d 777, 136 Cal Rptr 821; *C. v C.* (Del Sup) 320 A2d 717, 84 ALR3d 581; *Sentinel Communications Co. v Smith* (Fla App D5) 493 So 2d 1048, 11 FLW 1484, 13 Media L R 1775, review den (Fla) 503 So 2d 328

and (disapproved on other grounds by *Barron v Florida Freedom Newspapers, Inc.* (Fla) 531 So 2d 113, 13 FLW 497, 15 Media L R 1901) (holding, however, that the news media should be provided notice and an opportunity to be heard before the court orders the sealing of the record); *State ex rel. Bingaman v Brennan*, 98 NM 109, 645 P2d 982, 8 Media L R 1629.

As to the right of newspapers and the news media to view public records generally, see 66 Am Jur 2d, Records and Recording Laws § 16.

Footnote 87. *Atlanta Journal v Long*, 258 Ga 410, 369 SE2d 755, 15 Media L R 1821, corrected (Ga) 377 SE2d 150 and appeal after remand 259 Ga 23, 376 SE2d 865.

Footnote 88. *Keko v Lobrano* (La App 4th Cir) 497 So 2d 353, later proceeding (La App 4th Cir) 497 So 2d 355 and stay den, writ den (La) 497 So 2d 1003.

As to the right to copy public records generally, see 66 Am Jur 2d, Records and Recording Laws § 13.

Footnote 89. *Mulford v Davey*, 64 Nev 506, 186 P2d 360, 175 ALR 1255.

---

### § 33 Limitations on access; sealing of records

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

Generally, any right to inspect a court record is not absolute, but is subject to substantial limitations or qualifications. 90 The purpose of a request to inspect court records is important with regard to whether such a request will be granted; generally, a member of the public may have access to a judicial record only where it is shown that he or she has a proper or legitimate purpose in viewing the record. 91 However, in at least one jurisdiction, any person may examine all probate court records, regardless of whether he or she has an interest in the records. 92

A court has the power to prevent improper use of its records by imposing reasonable regulations limiting access to them. 93 The court may restrict access to its record to protect the privacy rights of third parties, 94 or the victim of a crime. 95 The court may limit access to records in a criminal case where such limitation is necessary to protect the defendant's right to a fair trial. 96

Parties to an action may request the court to seal or withhold from the public all or part of the record. 97 However, information that has been made public by consent of the parties or by proceedings in open court may not be withheld from public inspection. 98 A party seeking to have the record sealed has a heavy burden of showing that the interest of the party in confidentiality outweighs the public policy in favor of open court records. 99 In addition, access to court records may be limited by statutory provisions providing for the sealing of certain parts of the record. 1

Furthermore, the state may also seek to have public access to the record limited to protect

---

**Footnotes**

Footnote 90. *Sentinel Communications Co. v Watson* (Fla App D5) 615 So 2d 768, 18 FLW D 696, 21 Media L R 1186; *State v Widenhouse* (La App 2d Cir) 556 So 2d 187, later proceeding (La App 2d Cir) 587 So 2d 46, cert den (La) 589 So 2d 1066; *Ottaway Newspapers, Inc. v Appeals Court*, 372 Mass 539, 362 NE2d 1189; *Minneapolis Star & Tribune Co. v Schumacher* (Minn App) 383 NW2d 323, 12 Media L R 1831, revd on other grounds (Minn) 392 NW2d 197, 13 Media L R 1704; *Orr v Knowles*, 215 Neb 49, 337 NW2d 699; *Gibson v Grady* (2d Dept) 192 App Div 2d 657, 597 NYS2d 84; *Hutchison v Luddy*, 417 Pa Super 93, 611 A2d 1280, app gr 533 Pa 660, 625 A2d 1193 and app dismd without op (Pa) 649 A2d 435; *State v Archuleta* (Utah) 857 P2d 234, 217 Utah Adv Rep 16, 21 Media L R 2241; *Allied Daily Newspapers v Eikenberry*, 121 Wash 2d 205, 848 P2d 1258, 21 Media L R 1278.

A statute permitting free public access to public records such as court files does not create an absolute right to inspect public records; the trial court retains the power to control its files and impound any part of a file. *Deere & Co. v Finley* (1st Dist) 103 Ill App 3d 774, 59 Ill Dec 444, 431 NE2d 1201.

Footnote 91. *C. v C.* (Del Sup) 320 A2d 717, 84 ALR3d 581; *Le Clair v New Eng. Tel. & Tel Co.*, 112 NH 187, 294 A2d 698; *In re J. Children*, 101 Misc 2d 479, 421 NYS2d 308.

As to the requirement of a personal intent to access records generally, see 66 Am Jur 2d, Records and Recording Laws § 15.

Footnote 92. *State ex rel. Kernells v Ezell*, 291 Ala 440, 282 So 2d 266.

Footnote 93. *Mulford v Davey*, 64 Nev 506, 186 P2d 360, 175 ALR 1255; *Le Clair v New Eng. Tel. & Tel Co.*, 112 NH 187, 294 A2d 698; *State ex rel. Butler County Bar Ass'n v Robb* (Butler Co) 62 Ohio App 3d 298, 575 NE2d 497; *Richardson v Kimball*, 176 W Va 24, 340 SE2d 582 (criticized on other grounds by *State ex rel. Shaw v Board of Educ.*, 178 W Va 247, 358 SE2d 808).

The court may not make a blanket order exempting all cases from public access. *Charlottesville Newspapers, Inc. v Berry*, 215 Va 116, 206 SE2d 267.

Footnote 94. *State ex rel. Bingaman v Brennan*, 98 NM 109, 645 P2d 982, 8 Media L R 1629; *News-Press Publishing Co. v State* (Fla App D2) 345 So 2d 865.

Footnote 95. *In re Application of VV Pub. Corp.*, 120 NJ 508, 577 A2d 412, 17 Media L R 2256 (holding that the trial court may redact the names of child victims of sexual abuse in order to protect their identity).

As to the expungement of criminal records generally, see 21 Am Jur 2d, Criminal Law § 1021.

**Annotation:** Judicial expunction of criminal record of convicted adult, 11 ALR4th

Footnote 96. *Florida Freedom Newspapers, Inc. v McCrary* (Fla) 520 So 2d 32, 13 FLW 92, 14 Media L R 2374; *State v Widenhouse* (La App 2d Cir) 556 So 2d 187, later proceeding (La App 2d Cir) 587 So 2d 46, cert den (La) 589 So 2d 1066; *Northwest Publications, Inc. v Anderson* (Minn) 259 NW2d 254, 3 Media L R 1302; *State v Cribbs*, 237 Neb 947, 469 NW2d 108; *WNYT-TV v Moynihan* (3d Dept) 97 App Div 2d 555, 467 NYS2d 734, 9 Media L R 2423; *State v Archuleta* (Utah) 857 P2d 234, 217 Utah Adv Rep 16, 21 Media L R 2241.

The defendant must establish a substantial probability that his or her right to a fair trial will be prejudiced by publicity that closure of files would prevent, and that no reasonable alternative to the closure of files exists. *Ex parte Consolidated Pub. Co.* (Ala) 601 So 2d 423, 20 Media L R 1105, reh den, without op (Ala) 1992 Ala LEXIS 920 and cert den (US) 121 L Ed 2d 590, 113 S Ct 665.

The court may not seal the record on the ground of avoiding prejudicial pretrial publicity absent a thorough inquiry that demonstrates a compelling reason for limiting access to the record. *State v Tallman*, 148 Vt 465, 537 A2d 422, 15 Media L R 1344.

As to the effect of pretrial publicity on a fair trial, see 21 Am Jur 2d, Criminal Law § 688.

Footnote 97. *Estate of Hearst* (2nd Dist) 67 Cal App 3d 777, 136 Cal Rptr 821; *C. v C.* (Del Sup) 320 A2d 717, 84 ALR3d 581; *Johnson v State* (Fla) 336 So 2d 93; *Bequette v State*, 31 Md App 85, 355 A2d 515; *Rich-Haven Motor Sales, Inc. v National Bank of New York City* (2d Dept) 163 App Div 2d 288, 558 NYS2d 91, app den 76 NY2d 709, 561 NYS2d 548, 562 NE2d 873; *Feffer v Goodkind, Wechsler, Labaton & Rudoff* (Sup) 152 Misc 2d 812, 578 NYS2d 802, appeal after remand (1st Dept) 183 App Div 2d 678, 584 NYS2d 56; *Davenport v Garcia* (Tex) 834 SW2d 4, reh'g of cause overr (Sep 9, 1992).

The parties' agreement that the records of a case be sealed is an insufficient basis to limit access to the records. *In re Marriage of Johnson* (4th Dist) 232 Ill App 3d 1068, 174 Ill Dec 209, 598 NE2d 406, 20 Media L R 1604.

**Annotation:** Restricting public access to judicial records of state courts, 84 ALR3d 598.

Restricting access to records of disciplinary proceedings against attorneys, 83 ALR3d 749.

Footnote 98. *Cummings v Beaton & Assoc., Inc.* (1st Dist) 192 Ill App 3d 792, 139 Ill Dec 908, 549 NE2d 634, summary judgment gr (1st Dist) 249 Ill App 3d 287, 187 Ill Dec 701, 618 NE2d 292, app den 149 Ill 2d 648, 183 Ill Dec 860, 612 NE2d 512; *State v Widenhouse* (La App 2d Cir) 556 So 2d 187, later proceeding (La App 2d Cir) 587 So 2d 46, cert den (La) 589 So 2d 1066; *Schmedding v May*, 85 Mich 1, 48 NW 201; *Pepe v Pepe*, 258 NJ Super 157, 609 A2d 127, 20 Media L R 1515; *In re Application by John Hancock Mut. Life Ins. Co.*, 81 Misc 2d 269, 366 NYS2d 93.

Footnote 99. *Church of Scientology v Armstrong* (2nd Dist) 232 Cal App 3d 1060, 283

Cal Rptr 917, 91 CDOS 5954, 91 Daily Journal DAR 9172, review den (Cal) 1991 Cal LEXIS 4825; Post-Newsweek Stations, Florida, Inc. v Doe (Fla) 612 So 2d 549, 17 FLW S 715, 20 Media L R 2089; Atlanta Journal v Long, 258 Ga 410, 369 SE2d 755, 15 Media L R 1821, corrected (Ga) 377 SE2d 150 and appeal after remand 259 Ga 23, 376 SE2d 865; State v Cottman Transmission Systems, Inc., 75 Md App 647, 542 A2d 859, 15 Media L R 1644, later proceeding 86 Md App 714, 587 A2d 1190, cert den 324 Md 121, 596 A2d 627; Zukerman v Piper Pools, Inc., 256 NJ Super 622, 607 A2d 1027, certif den 130 NJ 394, 614 A2d 617; Cohen v Everett City Council, 85 Wash 2d 385, 535 P2d 801.

In an application to settle wrongful death claims and allocate and distribute settlement proceeds, petitioners would be entitled to have court records sealed, where the decedent's medical records which were attached to the petition for settlement contained anecdotal items which had not been established as fact and which were potentially embarrassing to the memory of decedent and to his family, and where disclosure of items would serve no useful public purpose. In re Estate of R.R. (Sur) 153 Misc 2d 747, 582 NYS2d 644.

Footnote 1. Mary R. v B. & R. Corp. (4th Dist) 149 Cal App 3d 308, 196 Cal Rptr 871; People ex rel. MacFarlane v A Delaware Corp. (Colo App) 626 P2d 1144 (consumer protection action); Giltner v Stark (Iowa) 219 NW2d 700; Honorof v Honorof (2d Dept) 54 App Div 2d 959, 388 NYS2d 641; Ottaway Newspapers, Inc. v Appeals Court, 372 Mass 539, 362 NE2d 1189 (bank records); In re Midland Pub. Co., 113 Mich App 55, 317 NW2d 284, 8 Media L R 1584, affd 420 Mich 148, 362 NW2d 580, 11 Media L R 1337 (not followed on other grounds by Booth Newspapers, Inc. v 12th Dist. Court Judge, 172 Mich App 688, 432 NW2d 400, 15 Media L R 2258) and (not followed on other grounds by People v Sanders (Mich Cir Ct) 18 Media L R 2301) (sex crime action); Mulford v Davey, 64 Nev 506, 186 P2d 360, 175 ALR 1255 (marital actions); State ex rel. Harmon v Bender, 25 Ohio St 3d 15, 25 Ohio BR 13, 494 NE2d 1135, 13 Media L R 1031 (superseded by on other grounds statute as stated in State ex rel. Fostoria Daily Review Co. v Fostoria Hospital Asso., 32 Ohio St 3d 327, 512 NE2d 1176); In re K.F., 151 Vt 211, 559 A2d 663, 16 Media L R 1984 (juvenile court proceedings).

**Annotation:** Expungement of juvenile court records, 71 ALR3d 753.

Footnote 2. In re Grady, 138 Misc 2d 983, 525 NYS2d 1004, 15 Media L R 1795 (grand jury proceeding); PG Pub. Co. v Commonwealth, 532 Pa 1, 614 A2d 1106, 20 Media L R 1737 (search warrants); State v Archuleta (Utah) 857 P2d 234, 217 Utah Adv Rep 16, 21 Media L R 2241; Seattle Times Co. v Eberharter, 105 Wash 2d 144, 713 P2d 710, 12 Media L R 1794 (search warrant affidavit); State v Green, 187 W Va 43, 415 SE2d 449.

---

## § 34 --Procedure for sealing record

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

When sealing the record, the court must specify when the record will be unsealed and its reasons for sealing the record, and must also state its findings and conclusions supporting that decision. 3 The trial court's inherent power to control public access to its records

does not extend beyond the period of its plenary power to amend, modify, or otherwise affect a prior order. 4

Where court records have been properly sealed, they are subject to being reopened upon a showing of good cause. 5 However, where the records have been sealed before trial, the records may become publicly accessible absent a showing of good cause as to why they should be kept secret. 6

Where appropriate, instead of sealing the record, the court may order that certain information be redacted from the record, so as not to intrude on the public's right of access to court records and at same time serve compelling governmental interests in protecting a party's privacy interest. 7

---

## Footnotes

Footnote 3. *Atlanta Journal v Long*, 258 Ga 410, 369 SE2d 755, 15 Media L R 1821, corrected (Ga) 377 SE2d 150 and appeal after remand 259 Ga 23, 376 SE2d 865.

Footnote 4. *Ashpole v Millard* (Tex App Houston (1st Dist)) 778 SW2d 169, 16 Media L R 2302.

The trial judge had no jurisdiction to seal records of a divorce action six months after the case had been voluntarily dismissed. *P.I.A. of Ft. Worth, Inc. v Sullivan* (Tex App Fort Worth) 837 SW2d 844.

As to the inherent powers of the court, generally, see § 43.

Footnote 5. *Cox v State* (Fla App D3) 582 So 2d 808, 16 FLW D 1908; *H.S. Gere & Sons, Inc. v Frey*, 400 Mass 326, 509 NE2d 271, 14 Media L R 1791; *New York State Police v Charles Q* (3d Dept) 192 App Div 2d 142, 600 NYS2d 513, petition dismd sub nom Charles "Q" v Constantine (3d Dept) 204 App Div 2d 904, 612 NYS2d 687, app gr 84 NY2d 806, 621 NYS2d 515, 645 NE2d 1215 and affd 85 NY2d 571, 626 NYS2d 992, 650 NE2d 839.

Footnote 6. *Carter v Utah Power & Light Co.* (Utah) 800 P2d 1095, 146 Utah Adv Rep 6, 18 Media L R 1497 (depositions were sealed to protect integrity of discovery); *State ex rel. Bilder v Delavan*, 112 Wis 2d 539, 334 NW2d 252, 9 Media L R 2294.

Footnote 7. *Doe v Shady Grove Adventist Hosp.*, 89 Md App 351, 598 A2d 507, 19 Media L R 1681; *State ex rel. The Cincinnati Post v Court of Appeals, Second Appellate Judicial Dist.*, 65 Ohio St 3d 378, 604 NE2d 153, 20 Media L R 2290.

The court may allow access to sealed records by redacting from the records the information that required protection. *In re Keene Sentinel*, 136 NH 121, 612 A2d 911, 20 Media L R 1770.

---

## VI. FUNCTIONS, POWERS, AND DUTIES [35-53]

## A. In General [35-42]

### **Research References**

ALR Digest: Courts §§ 1.5, 272

ALR Index: Courts; Divided Opinion

---

### **§ 35 Generally**

[View Entire Section](#)  
[Go to Parallel Reference Table](#)  
[Go to Supplement](#)

The proper function of the courts is to administer justice in accordance with the established rules of law, by applying the law, 8 even where they consider the policy underlying the law to be in error. 9

Courts may be called upon to determine what the public policy is; in so doing, the court may look to past judicial decisions, 10 but it may not rely solely on its own private view. 11 If the public policy has changed, it may recognize that fact and declare the new public policy. 12

Certain courts have the power to issue rules 13 that have the same effect as statutory rules. 14

---

### **§ 35 ----Generally [SUPPLEMENT]**

#### **Case authorities:**

Wisconsin Supreme Court need not defer to lower courts on matters involving meaning of statutes. *GTE N. v Public Serv. Comm'n* (1993) 176 Wis 2d 559, 500 NW2d 284, digest op at (Wis) 145 PUR4th 110.

Although court may occasionally decide whether public policy precludes finding of liability at pleading stage of case, better practice is to have full factual resolution at trial before evaluating policy considerations involved. *Coopman v State Farm Fire & Casualty Co.* (1993, App) 179 Wis 2d 548, 508 NW2d 610.

---

#### **Footnotes**

Footnote 8. *Dougan v McGrew*, 187 Kan 410, 357 P2d 319, 86 ALR2d 1174; *Williams v Randolph Hospital, Inc.*, 237 NC 387, 75 SE2d 303 (ovrld in part on other grounds by *Rabon v Rowan Memorial Hospital, Inc.*, 269 NC 1, 152 SE2d 485).

The duty of the state supreme court is to act as the final and ultimate authority in stating what is the law of the state. *Tyson v State* (Ind) 593 NE2d 175, application den (Ind) 622 NE2d 457.

Footnote 9. *State v Brady*, 156 Kan 831, 137 P2d 206; *Mertz v Mertz*, 271 NY 466, 3 NE2d 597, 108 ALR 1120.

Footnote 10. *Allen v Commercial Casualty Ins. Co.*, 131 NJL 475, 37 A2d 37, 154 ALR 834.

Footnote 11. *People ex rel. State Board of Medical Examiners v Pacific Health Corp.*, 12 Cal 2d 156, 82 P2d 429, 119 ALR 1284, cert den 306 US 633, 83 L Ed 1035, 59 S Ct 463.

Footnote 12. *Mississippi Baptist Hospital v Holmes*, 214 Miss 906, 55 So 2d 142, 25 ALR2d 12, sugg of error overr 214 Miss 940, 56 So 2d 709.

Footnote 13. §§ 48 et seq.

Footnote 14. § 53.

---

## § 36 Effect of separation of powers

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

Under the constitutional system of separation of the three branches of government, 15 the functions of the courts, which are part of the judicial branch, 16 cannot be encroached upon by another branch of the government or by any of its agencies. 17 By the same token, courts are prohibited from encroaching upon a domain of another branch of the government. 18 However, the legislature may act with regard to certain matters affecting the judicial process. 19 The legislature may not, however, delegate the supreme court's constitutional authority to any other department of state government. 20 In addition, while the executive branch has the authority to prosecute criminal cases in the courts, it does not have the right to impose settlement rules or confer veto power over procedures adopted by the judiciary. 21 On the other hand, court action may bear on legislative matters, such as by declaring a statute unconstitutional. 22

While the courts, as members of the judicial branch of the government are distinguished from administrative bodies belonging to the executive branch of the government, 23 courts may also have administrative functions. 24

---

### Footnotes

Footnote 15. 16 Am Jur 2d, Constitutional Law §§ 210 et seq.

Footnote 16. *In re Keenan*, 310 Mass 166, 37 NE2d 516, 137 ALR 766; *Leahey v Farrell*, 362 Pa 52, 66 A2d 577.

Footnote 17. 16 Am Jur 2d, Constitutional Law §§ 210, 217, 234 et seq.



Footnote 18. *Southworth v State* (4th Dept) 62 App Div 2d 731, 405 NYS2d 548, affd 47 NY2d 874, 419 NYS2d 71, 392 NE2d 1254 (holding that the procedures adopted for an experimental driver rehabilitation program established by the Commissioner of Motor Vehicles reflect the policy judgment of the state's managerial and executive personnel acting within the province of their professional capacities, and the soundness of the established method of operation was beyond the court's power of review).

Footnote 19. *Estate of Strong*, 54 Cal App 2d 604, 129 P2d 493 (legislature may cure irregularities or informalities in court proceedings); *State v Roy*, 40 NM 397, 60 P2d 646, 110 ALR 1 (legislature may prescribe rules of procedure, including rules of pleading); *Ramstead v Morgan*, 219 Or 383, 347 P2d 594, 77 ALR2d 481; *Leahey v Farrell*, 362 Pa 52, 66 A2d 577 (legislature may regulate, within reasonable limits, the compensation of court employees).

The amount of the docket or filing fee required to be paid to commence an action in the district court is strictly a matter of statutory law, is uniform throughout the state, and may not be altered by local court rule or judicial fiat. *Board of County Comm'rs v Graham*, 254 Kan 260, 864 P2d 1141.

Footnote 20. *Workers' Compensation Court v Merit Protection Comm'n* (Okla) 863 P2d 1226.

Footnote 21. *Bryce v Superior Court* (4th Dist) 205 Cal App 3d 671, 252 Cal Rptr 443 (holding that the policy of a county district attorney prohibiting his deputies from participating in court-supervised settlement conferences of felony cases unless held in open court violated the separation of powers doctrine of the California Constitution).

Footnote 22. 16 Am Jur 2d, Constitutional Law §§ 101 et seq., 221, 225.

Footnote 23. § 1.

Footnote 24. *Bryce v Superior Court* (4th Dist) 205 Cal App 3d 671, 252 Cal Rptr 443; *Cobb County v Campbell*, 256 Ga 519, 350 SE2d 466 (power to assign motions and cases to particular judges); *State ex rel. County Welfare Board v Starke Circuit Court*, 238 Ind 35, 147 NE2d 585; *Jefferson County ex rel. Grauman v Jefferson County Fiscal Court*, 301 Ky 405, 192 SW2d 185; *Clements v Kolie* (Mo App) 882 SW2d 299; *State ex rel. Hillyer v Tuscarawas City Bd. of Comm'rs*, 70 Ohio St 3d 94, 637 NE2d 311 (a court of common pleas has authority to appoint probation officers); *Workers' Compensation Court v Merit Protection Comm'n* (Okla) 863 P2d 1226 (authority to make personnel management decisions); *Ketcham v Lehner*, 149 Vt 314, 542 A2d 290 (the power to assign and reassign judges among the territorial units is given by the state constitution to the state supreme court as part of its administrative control of the state courts).

The state supreme court has administrative authority over all courts in Oklahoma, other than the senate sitting as a court of impeachment and the court on the judiciary. *Workers' Compensation Court v Merit Protection Comm'n* (Okla) 863 P2d 1226.

---

## § 37 Rendering decisions or opinions; generally

The primary function of courts is to make decisions with regard to matters properly brought before them. 25 Thus, a court speaks through its decisions and not through its opinions. 26 In rendering a decision, the court determines the facts of the case and applies the law to those facts; however, in a case tried by a court with a jury, it is the exclusive province of the jury to find the facts, and the trial court's duty is to see that its functions are intelligently and justly performed. 27 In making their decisions the courts are greatly influenced by judicial precedents. 28

Some decisions are a matter of the court's discretion, 29 which must be exercised in a sound manner, 30 and which should not be abused. 31

---

### **§ 37 ----Rendering decisions or opinions; generally [SUPPLEMENT]**

#### **Case authorities:**

In action alleging that defendant, as passenger of vehicle involved in high-speed chase of vehicle in which plaintiff was passenger, was liable for aiding and abetting negligent conduct of others, defendant's argument that, as matter of public policy, his conduct was so remote and removed from accident that he should be absolved from liability was not ripe for consideration as, instead of deciding public policy issue at pleading stage of case, better practice was to have full factual resolution at trial before evaluating public policy considerations involved. *Coopman v State Farm Fire & Casualty Co.* (1993, App) 179 Wis 2d 548, 508 NW2d 610.

---

#### **Footnotes**

Footnote 25. *Vecki v Sorensen* (1st Dist) 171 Cal App 2d 390, 340 P2d 1020.

Footnote 26. *Johnson v White*, 430 Mich 47, 420 NW2d 87.

Footnote 27. *People v Robarge*, 41 Cal 2d 628, 262 P2d 14.

Footnote 28. §§ 147 et seq.

Footnote 29. *Phillips v Moeller*, 147 Conn 482, 163 A2d 95; *State v Boston*, 234 Iowa 1047, 14 NW2d 676; *Chapman v Dorsey*, 230 Minn 279, 41 NW2d 438, 16 ALR2d 1015.

Footnote 30. *State ex rel. Rosen v McLaughlin* (Mo) 318 SW2d 181, 68 ALR2d 1366; *Sam Savin, Inc. v Burdsal* (Hamilton Co) 61 Ohio App 539, 15 Ohio Ops 347, 29 Ohio L Abs 321, 22 NE2d 914.

Footnote 31. *State v Boston*, 234 Iowa 1047, 14 NW2d 676.

---

## § 38 --Requirement as to quorum

[View Entire Section](#)  
[Go to Parallel Reference Table](#)  
[Go to Supplement](#)

In a court consisting of more than one judge, the state constitution or statute may require that a certain number of judges be present in order for the court to render a valid decision. 32 Absent a specific constitutional or statutory provision, a quorum for purposes of issuing a decision consists of a majority of the members of the court, although for some decisions more than a majority may be required. 33

The death, disqualification, resignation, or absence of a court member generally does not deprive the remaining judges of the authority to exercise the jurisdiction of the court if their number is sufficient to constitute the required quorum. 34 However, the court may not properly render a decision on the authority of two out of three judges, where one of the judges has resigned and is thus no longer serving on the court on the date the court's opinion is delivered. 35

---

## § 38 --Requirement as to quorum [SUPPLEMENT]

**Practice Aids:** Disqualification of judge as affecting validity of decision in which other nondisqualified judges participated 29 ALR5th 722.

---

### Footnotes

Footnote 32. Commonwealth v Petrillo, 340 Pa 33, 16 A2d 50.

Under a statute providing that the presence of three judges is necessary to transact business in any department, except such business as may be transacted in chambers by any judge, and providing that the concurrence of two judges is necessary to pronounce judgment, the presence of three judges is necessary, not only in hearing the oral argument but also in deliberating upon and in deciding the issues involved in the case. State v Lloyd A. Fry Roofing Co., 263 Or 300, 502 P2d 253.

Footnote 33. Bismarck Pub. Sch. Dist. #1 v State (ND) 511 NW2d 247 (holding that a statute may only be declared unconstitutional by the supreme court where at least four members of the court have joined in the decision).

Footnote 34. Commonwealth v Petrillo, 340 Pa 33, 16 A2d 50; Cowan v Murch, 97 Tenn 590, 37 SW 393.

A mortgage foreclosure case before the District Court of Appeal was fully considered by three judges, despite the death of one judge after the appeal was heard on oral argument and before the opinion of the court was filed, where the appeal was heard by a full panel, where a proposed opinion by the deceased judge was circulated, rejected by the majority,

and used as a dissenting opinion in the absence of a drafted dissent, and where, on appellants' motion for rehearing, a third judge was assigned, considered the briefs, and joined the majority. *Bowles v D. Mitchell Invest., Inc.* (Fla App D3) 365 So 2d 1028.

Footnote 35. *Hayden v Liberty Mut. Fire Ins. Co.* (Tex) 786 SW2d 260, reh'g of cause overr (Apr 25, 1990) and on remand (Tex App Beaumont) 805 SW2d 932.

---

## § 39 Opinions; generally

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

Although the term "opinion" is often used interchangeably with the term "decision," the decision of a court is its judgment, while the opinion is merely a statement of reasons for the decision. 36 The opinion may act as a guide to the construction of the decision when its meaning is uncertain. 37

To constitute an opinion of the court, the opinion accompanying a decision must be approved by the necessary quorum of judges of the court. 38 Where all the judges of a court agree on the opinion and the question involved is clear, the court may issue a "per curiam" opinion with limited discussion of the issue in the opinion. 39

An opinion is not necessarily limited to issues essential to the decision, but may also include expressions of opinion which are not necessary to support the decision reached by the court; such nonessential expressions are known as "dicta." 40 Mere dicta are not binding under the doctrine of stare decisis. 41

Not every decision need be accompanied by a written opinion. 42 However, the particular nature of a case, or the issue or issues involved, may impose upon a trial court the duty to state the reasons for its decision for adequate information of the appellate court or for purposes of legal guidance. 43

---

### Footnotes

Footnote 36. *Ernst v Municipal Court for Long Beach Judicial Dist.* (2nd Dist) 104 Cal App 3d 710, 163 Cal Rptr 861; *Seaboard A. L. R. Co. v Branham* (Fla) 104 So 2d 356.

Written opinions both explain to the parties the court's reason for the conclusion reached by the court and become precedents for the guidance of the courts and the profession. *State ex rel. Sluss v Appellate Court of Indiana*, 214 Ind 686, 17 NE2d 824.

Footnote 37. *Seaboard A. L. R. Co. v Branham* (Fla) 104 So 2d 356.

Footnote 38. *Lindsay v Cotton* (Fla App D3) 123 So 2d 745, 95 ALR2d 1029; *In re Independent Order of Sons of Italy Club Liquor License*, 161 Pa Super 448, 55 A2d 546.

An opinion approved by only half of the judges of the court is not the court's opinion.

Colligan v 680 Newark Ave. Realty Corp., 131 NJL 520, 37 A2d 206 (ovrld in part on other grounds by Faber v Creswick, 31 NJ 234, 156 A2d 252, 78 ALR2d 1230).

Footnote 39. Newmons v Lake Worth Drainage Dist. (Fla) 87 So 2d 49.

A per curiam affirmance opinion does not stand for any general pronouncement of principles of law that might have been urged by the parties in their pleadings and briefs. Acme Specialty Corp. v Miami (Fla App D3) 292 So 2d 379.

**Law Reviews:** Wasby, Peterson, Schubert, and Schubert, The per curiam opinion: Its nature and functions. 76 Judicature 29 (1992).

Footnote 40. Slovin v Gauger (Super) 56 Del 386, 193 A2d 452, affd (Sup) 57 Del 378, 200 A2d 565; State ex rel. Parker v Stonehouse Drainage Dist., 152 Kan 188, 102 P2d 1017; Winter v Hardester, 232 Miss 200, 98 So 2d 629, 71 ALR2d 982; Hayes v Wilmington, 243 NC 525, 91 SE2d 673.

Footnote 41. § 153.

Footnote 42. Parker v Atlantic C. L. R. Co., 133 NC 335, 45 SE 658.

Oral decisions are not entitled to as much weight as written opinions. State v Matthews, 143 Tenn 463, 226 SW 203, 13 ALR 314.

Footnote 43. Public Service Com. v Wisconsin Tel. Co., 289 US 67, 77 L Ed 1036, 53 S Ct 514; Baltimore & O. R. Co. v United States, 279 US 781, 73 L Ed 954, 49 S Ct 492; Parker v Atlantic C. L. R. Co., 133 NC 335, 45 SE 658.

Judges of the circuit court must file a written opinion stating briefly the decision made on each issue when deciding appeals on the record from the district court. Kirchner v Caughey, 326 Md 567, 606 A2d 257.

---

## § 40 --Advisory opinions

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

A court may render an advisory opinion where authorized by the state constitution, 44 or by statute, 45 although in some jurisdictions, statutes authorizing advisory opinions have been held invalid. 46 Absent such authorization, the court has no power to render an advisory opinion. 47

Where a federal court has certified a question to the state court to render an advisory opinion, some jurisdictions have responded to such requests, 48 while others have refused on the ground that the state court has no jurisdiction to render an advisory opinion. 49

---

## Footnotes

Footnote 44. In re Constitutionality of House Bill No. 222, 262 Ky 437, 90 SW2d 692, 103 ALR 1085; Opinion to Governor, 93 RI 262, 174 A2d 553.

A request by the governor for a written opinion as to whether certain legislation had constitutionally created judicial vacancies was properly within the purview of the judicial powers granted under the state constitution where the legislation in question directly affected the governor's duty to fill vacancies in judicial office and to appoint members of the judicial nominating commission, and where irreparable harm to the public could result from an erroneous implementation of the statute; the court would thus exercise its discretion to answer the governor's inquiries. In re Advisory Opinion to Governor (Fla) 374 So 2d 959.

Constitutional authorization to render advisory opinions is generally interpreted restrictively. In re Advisory Opinion to Governor, 150 Fla 556, 8 So 2d 26, 140 ALR 1481, supp op 151 Fla 44, 9 So 2d 172, 140 ALR 1492; Opinion to Governor, 96 RI 358, 191 A2d 611.

Footnote 45. In re Opinions of Justices (Sup) 47 Del 117, 88 A2d 128.

Footnote 46. *Morrow v Corbin*, 122 Tex 553, 62 SW2d 641.

Footnote 47. In re Constitutionality of House Bill No. 222, 262 Ky 437, 90 SW2d 692, 103 ALR 1085.

In a proceeding wherein the circuit court issued an order clarifying a statute upon the oral request of various law enforcement officials, the issuance of the order was clearly erroneous since the proceeding involved no parties or litigants and there is no authority by which a circuit court may issue an advisory opinion based on an oral request in a nonexistent legal proceeding. *Schwarz v Nourse* (Fla App D4) 390 So 2d 389.

The decree of a trial court enjoining the county board of elections from placing on the ballot two proposed amendments to a town charter was improper where the only ground for an injunction was that the proposed amendments, if adopted, would be unconstitutional since the action for an injunction was an attempt to obtain an advisory opinion. *Mt. Lebanon v County Bd. of Elections*, 470 Pa 317, 368 A2d 648.

Footnote 48. *Leiter Minerals, Inc. v California Co.*, 241 La 915, 132 So 2d 845, 16 OGR 119.

The state court may respond to certified questions only when it is apparent from the certification itself that all material facts have been either agreed on or found by the court and that the case is in such posture that the court's decision as to the applicable law will be determinative of the cause. In re *Richards* (Me) 223 A2d 827.

Footnote 49. *United Services Life Ins. Co. v Delaney* (Tex) 396 SW2d 855.

---

## § 41 Reports; generally

Generally, an official report contains all opinions, including concurring opinions and dissenting opinions. <sup>50</sup> However, a court may exclude from the official report of a case an opinion of one of its members which unnecessarily contains such scandalous matter. <sup>51</sup> Where a discrepancy occurs between the opinion in manuscript and as published, the manuscript version of the opinion controls. <sup>52</sup>

Although in certain cases, a reviewing court may issue a noncitable, unpublished, and abbreviated opinion, <sup>53</sup> the court may be required to publish its opinion where that opinion criticizes, with reasons given, an existing rule of law, <sup>54</sup> or where the issue in the case before the court is obviously neither well settled nor lacking in public importance. <sup>55</sup> In addition, the Supreme Court of the state may order the publication of an appellate court decision. <sup>56</sup>

---

## Footnotes

Footnote 50. *Musmanno v Eldredge*, 382 Pa 167, 114 A2d 511.

Courts of one state may take judicial notice of reports of decisions of courts of another state published under the authority of that other state. *Bostrom v Jennings*, 326 Mich 146, 40 NW2d 97.

Footnote 51. *Lucas v Central Missouri Trust Co.*, 349 Mo 537, 162 SW2d 569.

Footnote 52. *Harper v State*, 41 Ala App 188, 126 So 2d 232.

Footnote 53. *Worts v Hardy Constr. Co.*, 249 Mont 477, 817 P2d 231.

Unpublished opinions ease the burden on judges by allowing them to decide cases involving well-settled principles of law without having to spend the exhaustive time and effort required in deciding cases involving unsettled principles of law and writing full-fledged, thoroughly reasoned, published opinions. *Roberts v Sewerage & Water Bd. (La)* 634 So 2d 341.

Footnote 54. *Lyon v Western Title Ins. Co. (1st Dist)* 178 Cal App 3d 1191, 224 Cal Rptr 385.

Footnote 55. *Roberts v Sewerage & Water Bd. (La)* 634 So 2d 341.

Footnote 56. *State v Chambers*, 242 Neb 124, 493 NW2d 328 (holding that the state supreme court does not have jurisdiction under a statute to order the publication of an opinion of a single judge of the state court of appeals, nor does authority exist for publication in the absence of such an order).

---

## § 42 --Effect of headnotes or syllabi

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

In general, headnotes are prepared by the court reporter, although in some states the court itself composes the headnotes or syllabi. 57 In some jurisdictions, the syllabus constitutes the official opinion of the court and matters outside the syllabus are not to be regarded as the decision. 58 But even so, the rules stated in a court syllabus must be considered with reference to the facts of the case and to the questions presented to and considered by the court. 59

---

### Footnotes

Footnote 57. *Schupbach v Continental Oil Co.*, 193 Kan 401, 394 P2d 1, 21 OGR 304.

Footnote 58. *State v Boggs (Adams Co)* 89 Ohio App 3d 206, 624 NE2d 204, dismd, motion overr 67 Ohio St 3d 1510, 622 NE2d 657 (the syllabus of a state supreme court opinion states the law in Ohio).

The portion of an opinion to which no reference is made in the syllabus of the court is dicta and can have no force and effect. *Kemp v Matthews (App, Cuyahoga Co)* 89 Ohio L Abs 524, 183 NE2d 259, 98 ALR2d 837.

As to dicta, generally, see § 39.

Footnote 59. *Leube v Prudential Ins. Co.*, 147 Ohio St 450, 34 Ohio Ops 377, 72 NE2d 76, 2 ALR2d 936.

## B. Inherent Powers [43-45]

### Research References

ALR Digest: Courts §§ 4-10

ALR Index: Courtroom or Courthouse; Courts; Exclusion from Courtroom; Judges

---

## § 43 Generally

[View Entire Section](#)  
[Go to Parallel Reference Table](#)  
[Go to Supplement](#)

A court has certain inherent powers 60 within the scope of its jurisdiction 61 that exist apart from any constitutional or statutory authority. 62 They allow the court to take



actions reasonably necessary to administer justice efficiently, fairly, and economically 63 and are essential to the court's existence, dignity, and functions. 64 A court's inherent powers may neither be taken away nor abridged by statute. 65

---

## § 43 ----Generally [SUPPLEMENT]

### Case authorities:

Courts invested with the judicial power of the United States have certain inherent authority to protect the courts' proceedings and judgments in the course of discharging the courts' traditional responsibilities, although (1) in many instances the inherent powers of the courts may be controlled or overridden by statute or rule, (2) principles of deference counsel restraint in resorting to inherent power and require its use to be a reasonable response to the problems and needs that provoke it, and (3) a court's inherent power is limited by the necessity giving rise to its exercise. *Degen v United States* (1996, US) 135 L Ed 2d 102, 96 CDOS 4106, 96 Daily Journal DAR 6639, 9 FLW Fed S 655.

A court has inherent power over all matters reasonably necessary for the administration of justice within the scope of its jurisdiction, subject to or not in conflict with valid existing laws and constitutional provisions. *Veilleux v State* (1994, Fla) 635 So 2d 977, 19 FLW S 237.

---

### Footnotes

Footnote 60. *Arc Inv. Co. v Tiffith*, 164 Cal App 2d Supp 853, 330 P2d 305; *State v Brady*, 156 Kan 831, 137 P2d 206; *State ex rel. Kennedy v District Court*, 121 Mont 320, 194 P2d 256, 2 ALR2d 1050; *Timmerman v Timmerman*, 163 Neb 704, 81 NW2d 135, 65 ALR2d 1372; *Patterson v Pollock (Hamilton Co)* 84 Ohio App 489, 39 Ohio Ops 566, 53 Ohio L Abs 307, 84 NE2d 606; *Hambright v Cleveland (Okla)* 360 P2d 493; *Leahey v Farrell*, 362 Pa 52, 66 A2d 577; *Shields v Romine*, 122 W Va 639, 13 SE2d 16, mand gr 123 W Va 212, 14 SE2d 777; *In re Estate of Mayne (Wyo)* 345 P2d 790.

Footnote 61. *Hopkins v Barnhardt*, 223 NC 617, 27 SE2d 644; *In re Gonsky's Estate*, 79 ND 123, 55 NW2d 60; *Merrill v District Court of Fifth Judicial Dist.*, 73 Wyo 58, 272 P2d 597.

Footnote 62. *American Life Ins. Co. v Powell*, 259 Ala 70, 65 So 2d 516, app dismd 260 Ala 574, 71 So 2d 872; *Asbestos Claims Facility v Berry & Berry (1st Dist)* 219 Cal App 3d 9, 267 Cal Rptr 896, reh den (Cal App 1st Dist) 1990 Cal App LEXIS 402 and review den (Cal) 1990 Cal LEXIS 2231 and (disapproved on other grounds by *Kowis v Howard*, 3 Cal 4th 888, 12 Cal Rptr 2d 728, 838 P2d 250, 92 CDOS 9084, 92 Daily Journal DAR 15009); *State v Boston*, 234 Iowa 1047, 14 NW2d 676; *Mattfeld v Nester*, 226 Minn 106, 32 NW2d 291, 3 ALR2d 909 (superseded by statute on other grounds as stated in *Bonhiver v Fugelso, Porter, Simich & Whiteman, Inc. (Minn)* 355 NW2d 138); *State ex rel. Gentry v Becker*, 351 Mo 769, 174 SW2d 181 (ovrld on other grounds as stated in *State ex rel. Scott v Roper (Mo)* 688 SW2d 757, 52 ALR4th 1031); *Commonwealth v Brownmiller*, 141 Pa Super 107, 14 A2d 907.

Footnote 63. *State ex rel. County Welfare Board v Starke Circuit Court*, 238 Ind 35, 147

NE2d 585; In re Petition to Recall Dunleavy, 104 Nev 784, 769 P2d 1271; Goldman v Bryan, 104 Nev 644, 764 P2d 1296, later proceeding 106 Nev 30, 787 P2d 372; Hopkins v Barnhardt, 223 NC 617, 27 SE2d 644; Layman v State (Okla Crim) 355 P2d 444; School Dist. v School Dist., 374 Pa 134, 97 A2d 96.

Footnote 64. State ex rel. Mahoney v Superior Court, 78 Ariz 74, 275 P2d 887; Knox County Council v State, 217 Ind 493, 29 NE2d 405, 130 ALR 1427; Public Utility Com. v Cofer (Tex) 754 SW2d 121, reh'g of cause overr (Jun 15, 1988).

Courts have inherent power to effectuate the functions and duties imposed upon them in civil cases, and possibly to a lesser extent in criminal cases. State v Brady, 156 Kan 831, 137 P2d 206; State v Hickman, 2 NC App 627, 163 SE2d 632.

Footnote 65. In re Huff, 352 Mich 402, 91 NW2d 613; State ex rel. Ricco v Biggs, 198 Or 413, 255 P2d 1055, 38 ALR2d 720 (ovrld in part on other grounds by State ex rel. Maizels v Juba, 254 Or 323, 460 P2d 850); Burttschell v Sheppard, 123 Tex 113, 69 SW2d 402.

---

## § 44 Compelling payment of court's expenses

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

The courts have inherent power to determine and compel payment of those sums of money which are reasonable and necessary to carry out their mandated responsibilities, and powers and duties to administer justice. 66 The court's power to compel payment is not absolute; 67 where the court has adequate funds available to make up any deficit in its funding, it may not compel the state to fund the court's operation. 68 However, when inaction by those exercising legislative authority threatens to fiscally undermine the integrity of the judiciary, a court may invoke its inherent power to do what is reasonably necessary for the orderly and efficient exercise of the administration of justice. 69 The court may compel payment even where no funds had been appropriated to cover expenditures. 70

The types of expenses that the court may require be funded include office equipment, secretarial aid, furnishings, and related items, 71 such as postage, mailing, printing of necessary forms, telephone costs, upkeep and maintenance of a law library, 72 and payment of court personnel. 73

The court may also require appropriation or expenditure of public funds to pay certain costs of repairing, or refurbishing, courthouses or courtrooms. 74

---

### Footnotes

Footnote 66. Pena v District Court of Second Judicial Dist. (Colo) 681 P2d 953; Gwinnett County Asso. of Justices of the Peace v Gwinnett County Bd. of Comm'rs, 251 Ga 28, 302 SE2d 561; Gary City Court v Gary (Ind) 489 NE2d 511; Breaux Bridge v

Breaux Bridge (La) 444 So 2d 1219; County of Barnstable v Commonwealth, 410 Mass 326, 572 NE2d 548; Judges for Third Judicial Circuit v County of Wayne, 386 Mich 1, 190 NW2d 228, 59 ALR3d 548, cert den 405 US 923, 30 L Ed 2d 794, 92 S Ct 961; State ex rel. District Court v Whitaker, 210 Mont 363, 681 P2d 1097; In re 1978 Passaic County Budget Relating to Juvenile & Domestic Relations Court, 165 NJ Super 598, 398 A2d 1295; State ex rel. Donaldson v Alfred, 66 Ohio St 3d 327, 612 NE2d 717; Lavelle v Koch, 532 Pa 631, 617 A2d 319; Zylstra v Piva, 85 Wash 2d 743, 539 P2d 823, 90 BNA LRRM 2832.

The authority of a court to provide for the payment of expenses necessary for its proper functioning carries with it the corresponding responsibility to limit its request to those things reasonably necessary in the operation of the court, and to refrain from any extravagant, arbitrary, or unwarranted expenditures. McAfee v State, 258 Ind 677, 284 NE2d 778.

**Annotation:** Inherent power of court to compel appropriation or expenditure of funds for judicial purposes, 59 ALR3d 569.

Footnote 67. McCain v Grant Parish Police Jury (La App 3d Cir) 440 So 2d 1369, later proceeding (La App 3d Cir) 440 So 2d 1373.

Footnote 68. Twenty-First Judicial Dist. Court v State (La App 1st Cir) 563 So 2d 1185, cert den (La) 568 So 2d 1082 and cert den (La) 568 So 2d 1088.

Footnote 69. In re Alamance County Court Facilities, 329 NC 84, 405 SE2d 125.

Footnote 70. O'Coin's, Inc. v Treasurer of County of Worcester, 362 Mass 507, 287 NE2d 608.

Footnote 71. Angell v Judicial Dist. Court 23019, 108 Nev 923, 839 P2d 1329.

Footnote 72. Breaux Bridge v Breaux Bridge (La) 444 So 2d 1219.

Footnote 73. Grimsley v Twiggs County, 249 Ga 632, 292 SE2d 675; Seventeenth Dist. Probate Court v Gladwin County Bd. of Comm'rs, 155 Mich App 433, 401 NW2d 50, app den 428 Mich 874; Board of Comm'rs v Eleventh Judicial Dist. Court, 182 Mont 463, 597 P2d 728; Azbarea v North Las Vegas, 95 Nev 109, 590 P2d 161 (reasonable and necessary overtime included); State ex rel. Rudes v Rofkar, 15 Ohio St 3d 69, 15 Ohio BR 163, 472 NE2d 354 (ovrld in part on other grounds by State ex rel. Weaver v Lake County Bd. of Comm'rs, 62 Ohio St 3d 204, 580 NE2d 1090); Zylstra v Piva, 85 Wash 2d 743, 539 P2d 823, 90 BNA LRRM 2832.

Footnote 74. Pena v District Court of Second Judicial Dist. (Colo) 681 P2d 953; Gary City Court v Gary (Ind) 489 NE2d 511; O'Coin's, Inc. v Treasurer of County of Worcester, 362 Mass 507, 287 NE2d 608; In re Alamance County Court Facilities, 329 NC 84, 405 SE2d 125.

As to the court's responsibility for the courthouse and courtroom, generally, see § 18.

---

## § 45 Other specific powers

[View Entire Section](#)  
[Go to Parallel Reference Table](#)  
[Go to Supplement](#)

A state supreme court has the inherent power to adopt measures essential to due administration of justice and to exercise general superintending control over inferior courts. 75 Courts also have inherent powers to—

- manage the business before them. 76
- summon witnesses and compel their appearance in court. 77
- issue or honor letters rogatory. 78
- exercise reasonable control over discovery. 79
- compel and supervise the production of evidence. 80
- dismiss an action. 81
- relieve a party in default. 82
- discipline attorneys. 83
- prevent abuse of process. 84
- appoint counsel for indigents. 85
- compel appropriation or expenditure of public funds to compensate court-appointed attorneys appointed. 86
- correct errors in a record. 87
- maintain the dignity or decorum of the courtroom. 88
- regulate the admission of the public to the courtroom. 89
- take appropriate action in cases of contempt. 90
- compel payment for court expenses. 91
- enforce their own rules. 92

---

## **§ 45 ----Other specific powers [SUPPLEMENT]**

### **Case authorities:**

Trial courts have power, both inherent and statutory, to prevent unwarranted delay and

proliferation of stale matters before the court. *State v Braun* (1993, App) 178 Wis 2d 249, 504 NW2d 118, review gr (Wis) 508 NW2d 421 and affd 185 Wis 2d 153, 516 NW2d 740.

---

## Footnotes

Footnote 75. *Goldman v Bryan*, 104 Nev 644, 764 P2d 1296, later proceeding 106 Nev 30, 787 P2d 372; *In re Kading*, 70 Wis 2d 508, 235 NW2d 409, reh den 70 Wis 2d 543b, 238 NW2d 63 and supp op 70 Wis 2d 543f, 239 NW2d 297.

Footnote 76. *Barnard v Wassermann* (Utah) 855 P2d 243, 215 Utah Adv Rep 14; *Watts v Pennington* (Miss) 598 So 2d 1308.

Footnote 77. *Burttschell v Sheppard*, 123 Tex 113, 69 SW2d 402.

Footnote 78. *Electric Reduction Co. v Crane*, 239 Miss 18, 120 So 2d 765.

Footnote 79. *Asbestos Claims Facility v Berry & Berry* (1st Dist) 219 Cal App 3d 9, 267 Cal Rptr 896, reh den (Cal App 1st Dist) 1990 Cal App LEXIS 402 and review den (Cal) 1990 Cal LEXIS 2231 and (disapproved on other grounds by *Kowis v Howard*, 3 Cal 4th 888, 12 Cal Rptr 2d 728, 838 P2d 250, 92 CDOS 9084, 92 Daily Journal DAR 15009).

Footnote 80. *Vancas v State* (Fla App D4) 377 So 2d 1000.

Footnote 81. *Latham v Casey & King Corp.*, 23 Wis 2d 311, 127 NW2d 225.

Footnote 82. *Merrill v District Court of Fifth Judicial Dist.*, 73 Wyo 58, 272 P2d 597.

Footnote 83. *Chambers v NASCO*, 501 US 32, 115 L Ed 2d 27, 111 S Ct 2123, 91 CDOS 4222, 91 Daily Journal DAR 6585, 19 FR Serv 3d 817, reh den 501 US 1269, 115 L Ed 2d 1097, 112 S Ct 12 and (among conflicting authorities on other grounds noted in *Boland Marine & Mfg. Co. v Rihner* (CA5) 41 F3d 997, 31 FR Serv 3d 1069); *Shevin v Thuotte* (Fla App D2) 339 So 2d 253; *Barnard v Wassermann* (Utah) 855 P2d 243, 215 Utah Adv Rep 14; *Chevron Chem. Co. v Deloitte & Touche*, 176 Wis 2d 935, 501 NW2d 15.

As to acts of attorneys constituting contempt, see 17 Am Jur 2d, Contempt § 80.

Footnote 84. *Reid v Prentice-Hall, Inc.* (CA6 Ohio) 261 F2d 700, 1 FR Serv 2d 666; *Arc Inv. Co. v Tiffith*, 164 Cal App 2d Supp 853, 330 P2d 305; *Morrison v Guaranty Mortg. & Trust Co.*, 191 Miss 207, 199 So 110.

Footnote 85. *Knox County Council v State*, 217 Ind 493, 29 NE2d 405, 130 ALR 1427; *State ex rel. Gentry v Becker*, 351 Mo 769, 174 SW2d 181 (ovrld on other grounds as stated in *State ex rel. Scott v Roper* (Mo) 688 SW2d 757, 52 ALR4th 1031); *Kovarik v County of Banner*, 192 Neb 816, 224 NW2d 761.

◆ Observation: A court may not have the inherent power, however, to appoint and compel counsel to serve without compensation in civil cases. *State ex rel. Scott v Roper* (Mo) 688 SW2d 757, 52 ALR4th 1031.

Footnote 86. *People ex rel. Conn v Randolph*, 35 Ill 2d 24, 219 NE2d 337, 18 ALR3d 1065; *State v Lehman* (1987) 137 Wis 2d 65, 403 NW2d 438.

Where the compensation of appointed attorneys is set by statute, in some jurisdictions the court retains inherent power to order that the court-appointed defense counsel be paid fees in excess of the statutory maximum. *Board of County Comm'rs v Curry* (Fla App D2) 545 So 2d 930, 14 FLW 1176.

Footnote 87. *Weydeveld v Weydeveld*, 100 Colo 301, 67 P2d 72; *E. C. Robinson Lumber Co. v Hazel* (Mo App) 271 SW2d 610; *Gottwals v Rencher*, 60 Nev 35, 92 P2d 1000, subsequent app 60 Nev 47, 98 P2d 481, 126 ALR 1262; *State v Old*, 271 NC 341, 156 SE2d 756; *Caprita v Caprita*, 145 Ohio St 5, 30 Ohio Ops 238, 60 NE2d 483, 158 ALR 1201.

As to correcting or amending the court's record, generally, see § 29.

Footnote 88. *Jensen v Superior Court* (4th Dist) 154 Cal App 3d 533, 201 Cal Rptr 275 (regulation of courtroom attire); *Fitzpatrick v St. Louis, S. F. R. Co.* (Mo) 327 SW2d 801, 80 ALR2d 825; *Doyle v Couch* (Okla) 806 P2d 71; *Bly v Henry*, 28 Wash App 469, 624 P2d 717, review den 95 Wash 2d 1020.

**Annotation:** Power of court to impose standard of personal appearance or attire, 73 ALR3d 353.

Footnote 89. *Schavey v Royston*, 8 Ariz App 574, 448 P2d 418; *Pearson v United States* (Dist Col App) 581 A2d 347, cert den 502 US 808, 116 L Ed 2d 28, 112 S Ct 51; *People v Watts* (2d Dist) 66 Ill App 3d 971, 23 Ill Dec 659, 384 NE2d 453; *Fitzpatrick v St. Louis, S. F. R. Co.* (Mo) 327 SW2d 801, 80 ALR2d 825; *Dickinson Newspapers v Jorgensen* (ND) 338 NW2d 72, 9 Media L R 2063.

**Annotation:** Exclusion of public from state criminal trial by conducting trial or part thereof at other than regular place or time, 70 ALR4th 632.

Exclusion of public from state criminal trial in order to prevent disturbance by spectators or defendant, 55 ALR4th 1170.

Exclusion of public during criminal trial, 48 ALR2d 1436.

Footnote 90. *Peat, Marwick, Mitchell & Co. v Superior Court* (1st Dist) 200 Cal App 3d 272, 245 Cal Rptr 873, reh den (May 13, 1988) and review den (Jul 28, 1988) and cert dismd 490 US 1086, 104 L Ed 2d 673, 109 S Ct 2114; *State ex rel. Brubaker v Pritchard*, 236 Ind 222, 138 NE2d 233, 60 ALR2d 1239; *In re Huff*, 352 Mich 402, 91 NW2d 613; *Hernreich v Quinn*, 350 Mo 770, 168 SW2d 1054; *In re Estate of Mayne* (Wyo) 345 P2d 790.

As to contempt of court, generally, see 17 Am Jur 2d, Contempt §§ 4 et seq.

Footnote 91. § 44.

Footnote 92. § 53.

## C. Adjudication [46, 47]

### **Research References**

ALR Digest: Courts §§ 4, 4.5

ALR Index: Courts

---

### **§ 46 Generally**

|  |
|--|
| <p><a href="#">View Entire Section</a><br/><a href="#">Go to Parallel Reference Table</a><br/><a href="#">Go to Supplement</a></p> |
|--|

The court has the power to hear and determine a controversy among parties with adverse interests and conflicting claims. 93 The controversy must, however, be one in which there exists an actual antagonistic interest between the parties, 94 in which the parties are not one in interest and do not desire the same relief. 95 The controversy must also be justiciable, 96 in other words, it must be one that is appropriate for judicial inquiry. 97 A controversy is not justiciable if it exclusively or predominantly involves political questions the determination of which is a prerogative of the legislative or the executive branch of the government. 98 In addition, a controversy must be "ripe," such that it has reached, but has not passed, the point that the facts have sufficiently congealed to permit an intelligent and useful decision to be made. 99

---

### **§ 46 ----Generally [SUPPLEMENT]**

#### **Case authorities:**

Matters of foreign law may be determined by court, which may consider any relevant material or source, including testimony. *Reebok Int'l v McLaughlin* (1995, CA9 Cal) 49 F3d 1387, 95 CDOS 1672.

Where trial court issues supplemental decision more than 90 days after verdict, supplemental decision is nullity, since trial court loses competency to decide postverdict motions after 90-day time limit of statute (Stats § 805.16(3)). *Brandner by Brandner v Allstate Ins. Co.* (1994) 181 Wis 2d 1058, 512 NW2d 753.

---

### **Footnotes**

Footnote 93. *Key v All Persons Claiming Any Estate, etc.*, 160 Fla 723, 36 So 2d 366; *Lawyers' Asso. of St. Louis v St. Louis* (Mo App) 294 SW2d 676; *James H. Rhodes & Co. v Chausovsky*, 137 NJL 459, 60 A2d 623; *Bizzell v Great American Ins. Co.*, 248 NC 294, 103 SE2d 348.

Footnote 94. *BKHN, Inc. v Department of Health Services* (6th Dist) 3 Cal App 4th 301,

4 Cal Rptr 2d 188, 92 CDOS 1131, 92 Daily Journal DAR 1813.

Footnote 95. *Bizzell v Great American Ins. Co.*, 248 NC 294, 103 SE2d 348.

Footnote 96. *Application of President & Directors of Georgetown College, Inc.*, 118 US App DC 80, 331 F2d 1000, 8 FR Serv 2d 62g.3, Case 1, 9 ALR3d 1367, reh den 118 US App DC 90, 331 F2d 1010, 9 ALR3d 1381 and cert den 377 US 978, 12 L Ed 2d 746, 84 S Ct 1883; *Key v All Persons Claiming Any Estate, etc.*, 160 Fla 723, 36 So 2d 366; *Pitts v State Board of Examiners of Psychologists*, 222 Md 224, 160 A2d 200, 81 ALR2d 787; *Jones v Beame*, 45 NY2d 402, 408 NYS2d 449, 380 NE2d 277; *Musmanno v Eldredge*, 382 Pa 167, 114 A2d 511.

Footnote 97. *Baker v Carr*, 369 US 186, 7 L Ed 2d 663, 82 S Ct 691, on remand (MD Tenn) 206 F Supp 341.

Footnote 98. *State v Albritton*, 251 Ala 422, 37 So 2d 640; *Jones v Freeman*, 193 Okla 554, 146 P2d 564, cert den 322 US 717, 88 L Ed 1558, 64 S Ct 1288.

Footnote 99. *BKHN, Inc. v Department of Health Services* (6th Dist) 3 Cal App 4th 301, 4 Cal Rptr 2d 188, 92 CDOS 1131, 92 Daily Journal DAR 1813.

Courts should avoid the imposition by judgment of premature declarations or advice upon potential controversies. *State ex rel. Smith v Ocasek*, 46 Ohio St 2d 200, 75 Ohio Ops 2d 237, 346 NE2d 773.

---

## § 47 Moot questions or cases; hypothetical issues

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

Courts will generally decline to decide moot controversies. 1      However, courts may decide moot issues or cases where such a decision would be in the public interest. 2

A court will also generally refuse to decide a purely hypothetical or abstract question or issue, 3    or one not arising out of the facts involved in a case brought before it. 4

---

### Footnotes

Footnote 1. *People ex rel. Wallace v Labrenz*, 411 Ill 618, 104 NE2d 769, 30 ALR2d 1132, cert den 344 US 824, 97 L Ed 642, 73 S Ct 24; *Lloyd v Board of Supervisors*, 206 Md 36, 111 A2d 379; *Overesch v Campbell (Hamilton Co)* 95 Ohio App 359, 53 Ohio Ops 317, 119 NE2d 848; *Coffey v State*, 207 Tenn 260, 339 SW2d 1, 83 ALR2d 1000.

A court will not pass on the validity of ordinances that have been repealed or have expired prior to filing of the petition. *Automobile Club of Missouri v St. Louis (Mo)* 334 SW2d 355, 83 ALR2d 612.



**Annotation:** Comment Note.—When criminal case becomes moot so as to preclude review of or attack on conviction or sentence, 9 ALR3d 462.

Footnote 2. *People ex rel. Wallace v Labrenz*, 411 Ill 618, 104 NE2d 769, 30 ALR2d 1132, cert den 344 US 824, 97 L Ed 642, 73 S Ct 24; *Lloyd v Board of Supervisors*, 206 Md 36, 111 A2d 379; *Lawyers' Asso. of St. Louis v St. Louis (Mo App)* 294 SW2d 676; *Overesch v Campbell (Hamilton Co)* 95 Ohio App 359, 53 Ohio Ops 317, 119 NE2d 848; *Ashmore v Greater Greenville Sewer Dist.*, 211 SC 77, 44 SE2d 88, 173 ALR 397.

The criteria considered in determining the existence of the requisite degree of public interest are the public or private nature of the question presented, the desirability of an authoritative determination for future guidance of public officers, and the likelihood of future occurrence of the question. *People ex rel. Wallace v Labrenz*, 411 Ill 618, 104 NE2d 769, 30 ALR2d 1132, cert den 344 US 824, 97 L Ed 642, 73 S Ct 24.

Footnote 3. *Christy v Speer*, 210 Ark 756, 197 SW2d 466; *Griffin v Sturges*, 131 Conn 471, 40 A2d 758, 156 ALR 972; *State ex rel. Smith v Ocasek*, 46 Ohio St 2d 200, 75 Ohio Ops 2d 237, 346 NE2d 773.

Footnote 4. *In re Estate of Brooks*, 32 Ill 2d 361, 205 NE2d 435; *Kittredge v Boyd*, 136 Kan 691, 18 P2d 563, 93 ALR 574, reh den 137 Kan 241, 20 P2d 811, 93 ALR 583.

#### **D. Rulemaking [48-53]**

##### **Research References**

ALR Digest: Rules §§ 2-7  
ALR Index: Rules of Court

---

#### **§ 48 Generally**

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

Generally, courts have an inherent power to prescribe necessary rules of procedure or practice as necessary for the proper administration of justice. <sup>5</sup> The rulemaking power may also be vested in the court by the state's constitution, <sup>6</sup> or by legislation. <sup>7</sup> This power is generally vested in a jurisdiction's highest court, <sup>8</sup> which has broad powers to adopt rules of criminal procedure <sup>9</sup> and civil procedure, <sup>10</sup> and to promulgate rules for the administration of lower courts. <sup>11</sup> Lower courts may also have rulemaking authority. <sup>12</sup>

Although generally the legislature may not interfere with the court's authority to promulgate rules, <sup>13</sup> the state constitution may grant it limited authority to make procedural rules where necessary. <sup>14</sup>

---

## Footnotes

Footnote 5. *Ex parte Wilkey*, 233 Ala 375, 172 So 111; *Christy v Speer*, 210 Ark 756, 197 SW2d 466; *Appeal of Dattilo*, 136 Conn 488, 72 A2d 50; *R. E. W. Constr. Co. v District Court*, 88 Idaho 426, 400 P2d 390; *Slagle v Valenziano*, 134 Ind App 360, 188 NE2d 286; *In re Sparrow*, 338 Mo 203, 90 SW2d 401; *State v Roy*, 40 NM 397, 60 P2d 646, 110 ALR 1.

A circuit court possesses inherent rulemaking power to enable it effectively to implement the state rules of civil procedure, as provided for by both the rule and the common law. *Watts v Pennington* (Miss) 598 So 2d 1308.

**Annotation:** Power of court to adopt general rule requiring pretrial conference as distinguished from exercising its discretion in each case separately, 2 ALR2d 1061.

Footnote 6. *Garcia v Miller*, 261 Ga 531, 408 SE2d 97, 102-182 Fulton County D R 11B; *Winberry v Salisbury*, 5 NJ 240, 74 A2d 406, cert den 340 US 877, 95 L Ed 638, 71 S Ct 123.

Footnote 7. *Appeal of Dattilo*, 136 Conn 488, 72 A2d 50; *Petition of Florida State Bar Ass'n*, 155 Fla 710, 21 So 2d 605, 158 ALR 699; *Diversey Liquidating Corp. v Neunkirchen*, 370 Ill 523, 19 NE2d 363, 120 ALR 1395; *State v Roy*, 40 NM 397, 60 P2d 646, 110 ALR 1; *Maryville v Waters*, 207 Tenn 213, 338 SW2d 608.

Footnote 8. *Guthrie v Blakely*, 127 Ind App 140, 131 NE2d 357; *State v Roy*, 40 NM 397, 60 P2d 646, 110 ALR 1.

The state supreme court has the power to make procedural rules governing all legal matters subject only to the limitations of federal law and the state constitution. *Berdella v Pender* (Mo) 821 SW2d 846.

Footnote 9. *Hooper v State* (Ala) 585 So 2d 137, reh den (Ala) 1991 Ala LEXIS 160, on remand (Ala Crim App) 585 So 2d 142, reh den, without op (Ala Crim App) 1991 Ala Crim App LEXIS 400 and cert den, without op (Ala) 1991 Ala LEXIS 959 and cert den 503 US 920, 117 L Ed 2d 517, 112 S Ct 1295 and cert den 501 US 1232, 115 L Ed 2d 1024, 111 S Ct 2857.

Footnote 10. *Weidrick v Arnold*, 310 Ark 138, 835 SW2d 843.

Footnote 11. *Winberry v Salisbury*, 5 NJ 240, 74 A2d 406, cert den 340 US 877, 95 L Ed 638, 71 S Ct 123; *Ziebarth v Farm Credit Bank* (ND) 494 NW2d 145; *Barger v Brock* (Tenn) 535 SW2d 337.

Footnote 12. *In re Estate of Nuotila*, 360 Mich 256, 103 NW2d 638, 82 ALR2d 923.

The state supreme court is given by the state constitution exclusive rulemaking authority over interlocutory appeals to the district court of appeals, while the authority for appeals from the county court to the circuit court is established solely by general law as enacted by the legislature. *Blore v Fierro* (Fla) 636 So 2d 1329, 19 FLW S 264.

Footnote 13. *Burton v Mayer*, 274 Ky 263, 118 SW2d 547.

---

## § 49 Limitations on authority

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

To be valid, a rule of court must be reasonable. 15 In exercising its rulemaking authority, a court has the duty to ensure the orderly and expeditious conduct of court business as well as to secure the rights of parties. 16 A court generally may only promulgate rules regarding procedural matters. 17 Accordingly, a court may not prescribe a rule that creates a remedy in addition to that prescribed by the legislature, 18 nor may it enlarge or restrict the court's jurisdiction. 19 The court also may not promulgate rules in order to diminish constitutional rights, 20 defeat the right of litigants to access to the court, 21 or hinder parties from exercising their rights in court. 22

---

### Footnotes

Footnote 15. Letaw v Smith, 223 Ark 638, 268 SW2d 3, 45 ALR2d 1053; Slagle v Valenziano, 134 Ind App 360, 188 NE2d 286; State ex rel. Abel v District Court, 140 Mont 117, 368 P2d 572; McAlester v Nave (Okla) 451 P2d 681; Raiford v Raiford, 193 Va 221, 68 SE2d 888.

Footnote 16. Campbell v Criterion Group (Ind) 605 NE2d 150.

The rules of practice are not ends in themselves, but a means to achieving a functioning and just system. State v Mitchell, 126 NJ 565, 601 A2d 198.

Footnote 17. Petition of Florida State Bar Ass'n, 155 Fla 710, 21 So 2d 605, 158 ALR 699; State ex rel. Uzelac v Lake Criminal Court, 247 Ind 87, 212 NE2d 21; In re Sparrow, 338 Mo 203, 90 SW2d 401; State ex rel. Kennedy v District Court, 121 Mont 320, 194 P2d 256, 2 ALR2d 1050; Orlando v Doyle (Sup) 111 NYS2d 735; Brown v Mossop, 139 Ohio St 24, 21 Ohio Ops 518, 37 NE2d 598; Kamuchey v Trzesniewski, 8 Wis 2d 94, 98 NW2d 403; Snider v Rhodes, 53 Wyo 157, 79 P2d 481.

Footnote 18. Universal Credit Co. v Antonsen, 374 Ill 194, 29 NE2d 96, 130 ALR 626; Boudreaux v Yancey (La App 1st Cir) 256 So 2d 340, appeal after remand (La App 1st Cir) 319 So 2d 806 and (criticized on other grounds by Allwein v Horn (La App 5th Cir) 558 So 2d 810).

Footnote 19. United States v Sherwood, 312 US 584, 85 L Ed 1058, 61 S Ct 767; People ex rel. Mijares v Kniss, 144 Colo 551, 357 P2d 352, 47 BNA LRRM 2376, 41 CCH LC ¶ 50098, 82 ALR2d 1163; Slagle v Valenziano, 134 Ind App 360, 188 NE2d 286; Guimont v Naquin (La App 1st Cir) 152 So 2d 281; Mortiz v Byerly (Tex Civ App) 185 SW2d 589, writ ref.

Footnote 20. *Diversey Liquidating Corp. v Neunkirchen*, 370 Ill 523, 19 NE2d 363, 120 ALR 1395; *Auburn v Brooke*, 119 Wash 2d 623, 836 P2d 212.

Footnote 21. *Knox v Eighth Judicial Dist. Court*, 108 Nev 354, 830 P2d 1342; *Craine v Eighth Judicial Dist. Court*, 107 Nev 554, 816 P2d 451 (holding that a local rule of procedure may not impair the right of any person to prosecute an appeal to the state supreme court).

Footnote 22. *Hochberg v Davis* (1st Dept) 171 App Div 2d 192, 575 NYS2d 311, amd, on reh (1st Dept) 179 App Div 2d 372, holding that a supreme court justice would be directed to rescind his motion calendar rules conditioning making of written motions on prior judicial consent, for although such rules might discourage the filing of frivolous motions, they might also prevent a party from exercising the option to move for relief to which he might be entitled; moreover, denying a party permission to engage in motion practice hinders performance of counsel, and any inclination to file frivolous motions can be discouraged by imposition of sanctions.

---

## § 50 Promulgation

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

The state supreme court may hold its rulemaking conferences in private so as to be free of whatever influence the presence of others might occasion. 23 The rules of court must be published in some permanent form so as to give notice of them to anyone they do or might affect. 24 Although generally rules cannot be promulgated orally, 25 in at least one jurisdiction, there is authority for the view that an oral announcement of a rule of court by a judge constitutes publication. 26 A custom in the state court to postpone the trial of a case reached for trial when attorneys are engaged in trying a case in a federal court until the completion of the trial in the federal court, does not have the force and effect of a rule of court. 27

---

### Footnotes

Footnote 23. *In re Amendment of the State Bar* (Wis) 480 NW2d 442.

Footnote 24. *Brewer v State*, 187 Tenn 396, 215 SW2d 798.

Footnote 25. *State ex rel. Rose v Hoffman*, 227 Ind 256, 85 NE2d 486.

Footnote 26. *In re Guardianship of Dalton*, 138 Mont 96, 354 P2d 1048.

Footnote 27. *Patton v Evans*, 92 Utah 524, 69 P2d 969, 112 ALR 589.

---

## § 51 Construction; generally

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

When considering rules promulgated by courts, courts apply the principles of statutory construction. 28 The words of the rule should be given their plain and ordinary meaning, 29 without resort to subtle or forced construction to limit or expand the rule. 30 The court should give the rule a reasonable interpretation, not one that is illogical or incompatible with common sense. 31 However, court rules should be liberally construed, 32 in order to foster the purposes for which they were enacted. 33 Rules that appear in conflict with each other should be harmonized so as to give effect to both. 34

Where the words of the rule are clear and ambiguous, then the words control the interpretation of the rule. 35 However, if the language of the rule is ambiguous, then the court's intent in adopting the rule controls its interpretation. 36 Where the words of the rule do not disclose the intent, the court must read the rule as a whole and give meaningful application to all its provisions. The court may look at the rule's context, language, effects and consequences, spirit and purpose. 37 Advisory committee comments to the rules may guide the court in interpreting the rule but do not bind it. 38

---

### Footnotes

Footnote 28. *Keaulii v Simpson*, 74 Hawaii 417, 847 P2d 663, reconsideration den 74 Hawaii 650, 853 P2d 542 and cert den (US) 126 L Ed 2d 31, 114 S Ct 61; *State v Montgomery*, 334 Md 20, 637 A2d 1193; *Devenir Assocs. v Phoenix*, 169 Ariz 500, 821 P2d 161, 100 Ariz Adv Rep 3, reported at (Ariz) 1991 Ariz LEXIS 120; *Walker v Schneider* (ND) 477 NW2d 167; *Green by & Through Green v Lewis Truck Lines* (SC) 443 SE2d 906; *Vaughn v Chung*, 119 Wash 2d 273, 830 P2d 668.

As to the rules of statutory construction generally, see 73 Am Jur 2d, Statutes §§ 142 et seq.

Footnote 29. *Whitehead v State*, 310 SC 532, 426 SE2d 315; *State v Myers*, 117 Wash 2d 332, 815 P2d 761.

Footnote 30. *State ex rel. Lennon v Strazzella*, 331 Md 270, 627 A2d 1055; *Green by & Through Green v Lewis Truck Lines* (SC) 443 SE2d 906.

Footnote 31. *State ex rel. Lennon v Strazzella*, 331 Md 270, 627 A2d 1055; *Harbison v Chicago, R. I. & P. R. Co.*, 327 Mo 440, 37 SW2d 609, 79 ALR 1; *State ex rel. Ryan v District Court*, 140 Mont 135, 368 P2d 802; *State v Thomas*, 121 Wash 2d 504, 851 P2d 673.

Footnote 32. *Denver Air Center v District Court for Twentieth Judicial Dist.* (Colo) 839 P2d 1182.

Footnote 33. State ex rel. Harp v Vanderburgh Circuit Court, 227 Ind 353, 85 NE2d 254, 11 ALR2d 1108; State ex rel. Jones v Second Judicial Dist. Court, 59 Nev 460, 96 P2d 1096, reh den 59 Nev 467, 98 P2d 342; State v Greenwood, 120 Wash 2d 585, 845 P2d 971.

An overly strict application of a rule of civil procedure, especially when coupled with ultimate sanctions, may defeat the very ends of justice that the rules are designed to promote. Dougan v Gustaveson, 108 Nev 517, 835 P2d 795.

Footnote 34. Denver Air Center v District Court for Twentieth Judicial Dist. (Colo) 839 P2d 1182.

Footnote 35. State v Bible, 175 Ariz 549, 858 P2d 1152, 145 Ariz Adv Rep 3, cert den (US) 128 L Ed 2d 221, 114 S Ct 1578; State v Montgomery, 334 Md 20, 637 A2d 1193; Whitehead v State, 310 SC 532, 426 SE2d 315; First Sec. Bank v Conlin (Utah) 817 P2d 298, 164 Utah Adv Rep 27; State v Thomas, 121 Wash 2d 504, 851 P2d 673.

Footnote 36. State v Bible, 175 Ariz 549, 858 P2d 1152, 145 Ariz Adv Rep 3, cert den (US) 128 L Ed 2d 221, 114 S Ct 1578; Jarvis v Drake, 250 Kan 645, 830 P2d 23; State ex rel. Lennon v Strazzella, 331 Md 270, 627 A2d 1055.

Footnote 37. Devenir Assocs. v Phoenix, 169 Ariz 500, 821 P2d 161, 100 Ariz Adv Rep 3, reported at (Ariz) 1991 Ariz LEXIS 120.

The historical background of a rule of civil procedure, and the evolution in the law that preceded its establishment, are proper and relevant subjects of inquiry in arriving at its meaning. State ex rel. R-I School Dist. v Ewing (Mo App) 404 SW2d 433.

Footnote 38. State v Johnson (Minn) 514 NW2d 551.

---

## § 52 --Conflicts between rules and statutory or constitutional provisions

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

An apparent conflict between a court rule and a statutory provision should be harmonized and both given effect if possible. 39 However, where the conflict is irresolvable, a procedural rule generally prevails over a statute on procedure, 40 absent a constitutional provision subordinating the court's rulemaking authority to the legislature in regard to practice and procedure. 41 A statute may also control over a rule where to permit the rule to control would confer new jurisdiction on the court. 42 A court-created rule of procedure also cannot be applied in derogation of a substantive, legislatively protected right. 43

State rules of civil procedure supersede all previous court decisions. 44

---

## Footnotes

Footnote 39. *People ex rel. Mijares v Kniss*, 144 Colo 551, 357 P2d 352, 47 BNA LRRM 2376, 41 CCH LC ¶ 50098, 82 ALR2d 1163; *In re Keenan*, 310 Mass 166, 37 NE2d 516, 137 ALR 766; *In re Guardianship of Dalton*, 138 Mont 96, 354 P2d 1048; *Bowyer v Taack*, 107 Nev 625, 817 P2d 1176; *State v Thomas*, 121 Wash 2d 504, 851 P2d 673.

Footnote 40. *In re Opinion of Clerk (Ala)* 606 So 2d 138; *Hickson v State*, 316 Ark 783, 875 SW2d 492; *Thomas v Cornell*, 316 Ark 366, 872 SW2d 370; *State v Maxey*, 125 Idaho 505, 873 P2d 150; *Shaw v Shaw (Miss)* 603 So 2d 287; *State v Knudson (ND)* 499 NW2d 872; *Williams v Cummings*, 191 W Va 370, 445 SE2d 757.

A statute requiring the court in a mortgage foreclosure action to sever for separate trial all counterclaims against the foreclosing mortgagee, is unconstitutional, since it conflicts with a court rule of procedure which leaves severance of counterclaims to the court's discretion, since where the Florida Supreme Court promulgates rules relating to the practice and procedure of all courts, and a statute provides a contrary practice or procedure, the statute is unconstitutional to the extent of the conflict. *Haven Federal Sav. & Loan Ass'n v Kirian (Fla)* 579 So 2d 730, 16 FLW S 309.

Footnote 41. *Stokes v Demark Emergency Medical Servs. (SC)* 433 SE2d 850.

The supreme court rules govern over contradictory statutes in procedural matters unless the general assembly specifically annuls or amends the rules in a bill limited to that purpose. *Ostermueller v Potter (Mo)* 868 SW2d 110.

A court's rulemaking power, limited by the proviso that its rules not be inconsistent with the state constitution or laws, was exceeded by a rule limiting witnesses in appeals from arbitration proceedings to those witnesses who had appeared at the arbitration hearing where legislation governing arbitration expressly provided that appeals were to be de novo. *Weber v Lynch*, 237 Pa Super 48, 346 A2d 363, affd 473 Pa 599, 375 A2d 1278.

Footnote 42. *People ex rel. Mijares v Kniss*, 144 Colo 551, 357 P2d 352, 47 BNA LRRM 2376, 41 CCH LC ¶ 50098, 82 ALR2d 1163; *Simms v Warden*, 229 Conn 178, 640 A2d 601.

As to the prohibition of a court rule enlarging or restricting the court's jurisdiction, see § 49.

Footnote 43. *People ex rel. Mijares v Kniss*, 144 Colo 551, 357 P2d 352, 47 BNA LRRM 2376, 41 CCH LC ¶ 50098, 82 ALR2d 1163; *Shewan v State (Fla App D5)* 396 So 2d 1133; *Slagle v Valenziano*, 134 Ind App 360, 188 NE2d 286; *Richey v Richey (Ky)* 389 SW2d 914; *Gair v Peck*, 6 NY2d 97, 188 NYS2d 491, 160 NE2d 43, 77 ALR2d 390, remittitur amd 6 NY2d 983, 191 NYS2d 951, 161 NE2d 736, cert den and app dismd 361 US 374, 4 L Ed 2d 380, 80 S Ct 401; *Ashford v Goodwin*, 103 Tex 491, 131 SW 535; *Wagner v Edgington Coal Co.*, 100 W Va 117, 130 SE 94; *Weber v Weber*, 176 Wis 2d 1085, 501 NW2d 413; *Stevenson v Milwaukee County*, 140 Wis 14, 121 NW 654.

Footnote 44. *Thomas v Cornell*, 316 Ark 366, 872 SW2d 370; *Shaw v Shaw (Miss)* 603 So 2d 287.

---

## § 53 Effect of rules

[View Entire Section](#)  
[Go to Parallel Reference Table](#)  
[Go to Supplement](#)

When rules are adopted pursuant to the court's rulemaking authority and are properly promulgated, they have the force and effect of law. 45 They are tantamount to, and have the same effect as, statutes. 46 Also, like statutes, a rule of court generally has prospective effect only, 47 although in at least one jurisdiction, a rule of appellate procedure applies retroactively. 48

Rules of court are binding on the court as well as on the parties, 49 and the court's failure to follow its own rules of court may result in the reversal of its decision on appeal. 50 However, a court may decide not to apply a rule of court in a particular case where not doing so appears necessary in the interests of justice, 51 unless the rule is mandatory 52 or where disregarding the rule would seriously affect the substantial rights of a party. 53

Despite the self-imposed limitation of the rules of appellate procedure which limit the actions that are generally brought before the court for review or action, an appellate court may still choose to speak on an issue for which the appellate rules do not specifically provide. 54

Since counsel have a professional responsibility to be aware of duly adopted local court rules, 55 a party's lack of knowledge of a clear rule of civil procedure is not an excuse for relief from the rules. 56 Courts have statutory and inherent authority to impose sanctions for failure to comply with procedural rules. 57

---

## § 53 ----Effect of rules [SUPPLEMENT]

### Case authorities:

Whatever the scope of the inherent power of federal courts to formulate procedural rules not specifically required by the Federal Constitution or by Congress, such power does not include the power to develop rules that circumvent or conflict with the Federal Rules of Criminal Procedure; the United States Supreme Court's case law does not establish any inherent power of the federal courts to act in contravention of applicable federal court rules. *Carlisle v United States* (1996, US) 134 L Ed 2d 613, 96 CDOS 2929, 96 Daily Journal DAR 4865, 9 FLW Fed S 549.

---

### Footnotes

Footnote 45. *Glatstein v Grund*, 243 Iowa 541, 51 NW2d 162, 36 ALR2d 531; *In re Knapp's Estate*, 145 Me 189, 74 A2d 217; *Harbison v Chicago, R. I. & P. R. Co.*, 327 Mo 440, 37 SW2d 609, 79 ALR 1; *Fullmer v Wyoming Employment Sec. Comm'n* (Wyo) 858 P2d 1122.



Footnote 46. *Amana Soc. v Selzer*, 250 Iowa 380, 94 NW2d 337; *Estate of Dauer v Zabel*, 9 Mich App 176, 156 NW2d 34, vacated on other grounds 381 Mich 555, 164 NW2d 1, conformed to 19 Mich App 198, 172 NW2d 701; *Margold v Eighth Judicial Dist. Court*, 109 Nev 804, 858 P2d 33; *Sparrow v Nerzig*, 228 SC 277, 89 SE2d 718, 56 ALR2d 328.

As to the operations and effect of statutes generally, see 73 Am Jur 2d, Statutes §§ 342 et seq.

Footnote 47. *Schlaefel v Schlaefel*, 71 App DC 350, 112 F2d 177, 130 ALR 1014; *State ex rel. Uzelac v Lake Criminal Court*, 247 Ind 87, 212 NE2d 21; *Fowler v Francis (Okla)* 362 P2d 107; *State v Ladiges*, 63 Wash 2d 230, 386 P2d 416.

An amendment to a rule of civil procedure requiring a narrative summary of the purportedly undisputed material facts does not apply to an action commenced before the amendment's effective date. *Lennon v Peterson (Ala)* 624 So 2d 171.

Footnote 48. *E.C. Garcia & Co. v Arizona State Dep't of Revenue (App)* 178 Ariz 510, 875 P2d 169, 152 Ariz Adv Rep 39.

Footnote 49. *In re Knapp's Estate*, 145 Me 189, 74 A2d 217; *Pratt v Pratt*, 157 Mass 503, 32 NE 747; *Shore v Chester (Franklin Co)* 40 Ohio App 2d 412, 69 Ohio Ops 2d 368, 321 NE2d 614; *Fowler v Francis (Okla)* 362 P2d 107.

Footnote 50. *Guthrie v Blakely*, 127 Ind App 140, 131 NE2d 357 (rules validly issued by a trial court are generally recognized also by an appellate court).

Footnote 51. *Farmers' Bank & Trust Co.'s Receiver v Brown*, 249 Ky 820, 61 SW2d 628, 91 ALR 323; *In re Shields*, 96 RI 448, 192 A2d 430; *Smirl v Globe Laboratories, Inc.*, 144 Tex 41, 188 SW2d 676.

Footnote 52. *In re G. W. Giannini, Inc. (CA2 NY)* 90 F2d 445, 111 ALR 1492.

Footnote 53. *Kamuchey v Trzesniewski*, 8 Wis 2d 94, 98 NW2d 403.

Footnote 54. *Tyson v State (Ind)* 593 NE2d 175, application den (Ind) 622 NE2d 457.

Footnote 55. *Beverly Union Co. v Superior Court (2nd Dist)* 206 Cal App 3d 40, 253 Cal Rptr 359.

Footnote 56. *Sadowsky v City of Glendive*, 259 Mont 419, 856 P2d 556.

Footnote 57. *Brekhus & Williams v Parker-Rhodes (1st Dist)* 198 Cal App 3d 788, 244 Cal Rptr 48 (holding that due process precludes a court from imposing sanctions upon counsel for violating a local court rule unless it provides counsel with fair warning and an opportunity to be heard prior to the imposition of the sanction); *Barnard v Wassermann (Utah)* 855 P2d 243, 215 Utah Adv Rep 14; *Chevron Chem. Co. v Deloitte & Touche*, 176 Wis 2d 935, 501 NW2d 15.

As to the inherent power of courts to discipline attorneys, generally, see § 45.

---

## VII. JURISDICTION [54-129]

### A. In General [54-65]

#### **Research References**

28 USCS §§ 1604, 1605, 1607

ALR Digest: Courts §§ 2, 3, 12-15

ALR Index: Jurisdiction

1 Am Jur Pl & Pr Forms (Rev), Abatement, Revival, and Stay, Forms 61-68; 8A Am Jur Pl & Pr Forms (Rev), Dismissal, Discontinuance, and Nonsuit, Forms 91, 96, 97, 99, 101; 19A Am Jur Pl & Pr Forms (Rev), Pleading, Forms 344-346

22 Am Jur Trials 199, The Use of Discovery in Product-Related Burn Injury Cases

### 1. Scope and Terms [54-57]

---

#### **§ 54 Generally**

[View Entire Section](#)  
[Go to Parallel Reference Table](#)  
[Go to Supplement](#)

The term "jurisdiction," which is derived from two Latin words, one meaning law and the other to speak, 58 has different meanings, depending on its context. 59 Although the term sometimes refers to the power or authority of agencies other than courts, 60 or to the power and authority of a state as a whole, 61 the jurisdiction discussed here is the non-appellate jurisdiction of state courts in civil cases. 62

The question of jurisdiction is always fundamental, 63 and is a question of law, involving a determination by the court of its right to proceed with the litigation. 64 There are three separate elements of the jurisdiction of a court: (1) jurisdiction over the person, 65 (2) jurisdiction over the subject matter, 66 and (3) jurisdiction to render the particular judgment sought, 67 or, as is sometimes said, jurisdiction of the particular case. 68 Lack of jurisdiction in a strict sense means the entire lack of power to hear or determine the case and the absence of authority over the subject matter or the parties. 69

---

#### **§ 54 ----Generally [SUPPLEMENT]**

##### **Case authorities:**

A second judge was not authorized by GS § 1A-1, Rule 23 to review and modify another judge's prior order for class certification. However, the class certification order was interlocutory in the sense that it was made in the progress of the cause and directed a further proceeding preliminary to the final decree, and a subsequent judge could thus

modify the order for circumstances which changed the legal foundation for the prior order. *Dublin v UCR, Inc.* (1994) 115 NC App 209, 444 SE2d 455.

Whether court has jurisdiction is question of law which is reviewable de novo. *Socha v Socha* (1994, App) 183 Wis 2d 390, 515 NW2d 337.

---

## Footnotes

Footnote 58. *Fraga v State Compensation Comm'r*, 125 W Va 107, 23 SE2d 641.

Footnote 59. *State ex rel. Cox v Consolidated Independent School Dist.*, 246 Iowa 566, 68 NW2d 305.

Footnote 60. *Fraga v State Compensation Comm'r*, 125 W Va 107, 23 SE2d 641.

For a discussion of the jurisdiction of administrative agencies, see 2 Am Jur 2d, Administrative Law §§ 274 et seq.

Footnote 61. *Pepperell Mfg. Co. v Alabama Nat'l Bank*, 261 Ala 665, 75 So 2d 665.

Footnote 62. For a discussion of the appellate jurisdiction of state courts, see 4 Am Jur 2d, Appellate Review §§ 1 et seq.

For a discussion of the jurisdiction of courts in criminal cases, see 21 Am Jur 2d, Criminal Law §§ 336 et seq.

Footnote 63. *State v Albritton*, 251 Ala 422, 37 So 2d 640.

Footnote 64. *Bridges v Wyandotte Worsted Co.*, 243 SC 1, 132 SE2d 18.

Footnote 65. For a discussion of personal jurisdiction, see § 70.

Footnote 66. For a discussion of subject matter jurisdiction, see § 70.

Footnote 67. *Lauf v James*, 33 Conn App 223, 635 A2d 300.

Footnote 68. *Mirabal v Mirabal*, 30 Conn App 821, 622 A2d 1037; *Browning v Walters* (Ind App) 620 NE2d 28.

Footnote 69. § 65.

---

## § 55 Definitions

|   |
|---|
| <p><a href="#">View Entire Section</a><br/><a href="#">Go to Parallel Reference Table</a></p> |
|---|

"Jurisdiction" has been variously defined as the power of a court to hear and determine a

cause of action presented to it, 70 the power of a court to adjudicate the kind of case before it, 71 the power of a court to adjudicate a case when the proper parties are before it, 72 and the power of a court to make the particular decision it is asked to render. 73 In other words, "jurisdiction" refers to the power of the court over the subject matter, over the property or res in contest, and to the authority of the court to render the kind of judgment or decree it assumes to make. 74 "Jurisdiction of a particular case" means the right, authority, and power to hear and determine a specific case within that class of cases over which a court has subject matter jurisdiction. 75

◆ Caution: A court can have subject matter jurisdiction over a class of cases and not have jurisdiction over a particular case due to the facts of that case. For example, a party's failure to follow procedural rules can affect the trial court's jurisdiction over a particular case, but not the court's subject matter jurisdiction. *Browning v Walters* (Ind App) 620 NE2d 28.

---

## Footnotes

Footnote 70. *State ex rel. Public Service Com. v Marion Circuit Court*, 230 Ind 277, 100 NE2d 888; *Welch v Welch*, 246 Neb 435, 519 NW2d 262; *James H. Rhodes & Co. v Chausovsky*, 137 NJL 459, 60 A2d 623.

"Jurisdiction," which is the right to determine and hear an issue, transcends all procedural considerations and involves the fundamental power and authority of the court itself. *Wippert v Blackfeet Tribe*, 260 Mont 93, 859 P2d 420.

Footnote 71. *Amana Soc. v Selzer*, 250 Iowa 380, 94 NW2d 337; *Field v Field*, 31 NJ Super 139, 105 A2d 863; *Standard Surety & Casualty Co. v Sloan*, 180 Tenn 220, 173 SW2d 436, 149 ALR 407.

Footnote 72. *Woods v Christensen*, 249 Iowa 232, 86 NW2d 98.

As to the meaning of the term "jurisdiction over the parties," see § 70.

Footnote 73. *State ex rel. Cairy v Iowa Co-operative Asso.*, 248 Iowa 167, 79 NW2d 775.

Footnote 74. *Belanger v Belanger* (Me) 240 A2d 743.

As to the meaning of the term "jurisdiction over the subject matter," see § 70.

Footnote 75. *Browning v Walters* (Ind App) 620 NE2d 28.

---

## § 56 Distinctions; venue and jurisdiction

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

Although venue has sometimes been treated as jurisdictional in nature, 76 and the concepts "jurisdiction" and "venue" have a close relation 77 that sometimes leads to confusion between them, 78 the two concepts must be distinguished. 79 "Venue," in the technical meaning of the term, means the place where a case is to be tried, while "jurisdiction" refers to the power of the court to hear and determine the case. 80 Although the right to object to the exercise of jurisdiction by a court on the ground that it lacks jurisdiction over the subject matter cannot be waived, 81 a litigant's right as to a particular venue for trial can be waived 82 and a defect in venue can be cured by the consent of the parties. 83

---

## Footnotes

Footnote 76. *Pepperell Mfg. Co. v Alabama Nat'l Bank*, 261 Ala 665, 75 So 2d 665.

Footnote 77. *In re Estate of Lewin*, 174 Neb 596, 119 NW2d 96.

Footnote 78. *Pepperell Mfg. Co. v Alabama Nat'l Bank*, 261 Ala 665, 75 So 2d 665; *Stewart v Sampson*, 285 Ky 447, 148 SW2d 278.

Footnote 79. *Pepperell Mfg. Co. v Alabama Nat'l Bank*, 261 Ala 665, 75 So 2d 665; *Gland-O-Lac Co. v Franklin County Circuit Court*, 230 Ark 919, 327 SW2d 558; *Brown v State*, 219 Ind 251, 37 NE2d 73, 137 ALR 679; *Stewart v Sampson*, 285 Ky 447, 148 SW2d 278; *Electrical Prods. Consol. v Bodell*, 132 Mont 243, 316 P2d 788, 69 ALR2d 1318.

As to venue, generally, see 77 Am Jur 2d, Venue.

Footnote 80. *Gland-O-Lac Co. v Franklin County Circuit Court*, 230 Ark 919, 327 SW2d 558; *Kalosha v Novick*, 84 NM 502, 505 P2d 845.

Footnote 81. § 63.

Footnote 82. 77 Am Jur 2d, Venue §§ 45 et seq.

Footnote 83. 77 Am Jur 2d, Venue § 52.

---

## § 57 --Error and lack of jurisdiction

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

The lack of jurisdiction of a court is distinct from the making of an erroneous decision by a court in the exercise of the jurisdiction it possesses. 84 Jurisdiction is the power to decide erroneously as well as correctly. 85

The distinction between lack of jurisdiction and any other error affecting a decision of a court is important, since when a court lacks jurisdiction its decision, right or wrong, is

void and subject to collateral attack. 86 Also, writs such as prohibition 87 and habeas corpus 88 are generally available only when a court has acted without jurisdiction, and not when it has acted merely erroneously.

---

## Footnotes

Footnote 84. *Groves v Donohue*, 254 Iowa 412, 118 NW2d 65; *Beyer v Second Judicial Dist. Court*, 67 Nev 480, 221 P2d 1024; *Petersen v Falzarano*, 6 NJ 447, 79 A2d 50; *Kessler v Board of Educ. (ND)* 87 NW2d 743 (superseded by statute on other grounds as stated in *Myhre v School Bd. (ND)* 122 NW2d 816).

Footnote 85. *Arizona Pub. Serv. Co. v Southern Union Gas Co.*, 76 Ariz 373, 265 P2d 435; *Petersen v Falzarano*, 6 NJ 447, 79 A2d 50.

Courts do not lose subject matter jurisdiction merely by interpreting the law erroneously. *In re Marriage of Major*, 71 Wash App 531, 859 P2d 1262.

Footnote 86. 47 Am Jur 2d, Judgments §§ 933 et seq.

Footnote 87. 63A Am Jur 2d, Prohibition §§ 37 et seq.

Footnote 88. 39 Am Jur 2d, Habeas Corpus §§ 28 et seq.

## 2. Sources, Powers, and Duties [58-61]

---

### § 58 Constitution and legislation as sources of jurisdiction

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

A court possesses only such jurisdictional powers as are directly, or indirectly, expressly or by implication, conferred on it by the constitution or legislation of the sovereignty on behalf of which it functions. 89 When the jurisdiction of a court is fixed by a constitutional provision, the legislature is powerless to abridge or enlarge the constitutional jurisdiction of the court. 90

Although state jurisdiction over certain cases rests on federal statutes conferring such jurisdiction on state courts, 91 this does not mean that Congress can vest any part of the judicial power of the United States in state courts. 92

Since the legislature can only give such powers to courts as are not in derogation of a constitutional provision, 93 a statute purporting to affect the jurisdiction of a court will be construed, if it is reasonably possible to do so, so as not to be in conflict with a constitutional provision. 94

---

## Footnotes

Footnote 89. State ex rel. County Welfare Board v Starke Circuit Court, 238 Ind 35, 147 NE2d 585; Stilwell v Markham, 135 Kan 206, 10 P2d 15; Stewart v Sampson, 285 Ky 447, 148 SW2d 278; In re Buckles, 331 Mo 405, 53 SW2d 1055; Coonradt v Sailors, 186 Tenn 294, 209 SW2d 859, 2 ALR2d 880.

The authority to determine the jurisdiction of the Colorado courts is vested exclusively in the General Assembly. South Wash. Assocs. v Flanagan (Colo App) 859 P2d 217, cert den (Colo) 1993 Colo LEXIS 782.

Subject matter jurisdiction can only be attacked when the court has no power to entertain the controversy, as when the Constitution or legislature explicitly denies jurisdiction. In re Marriage of Major, 71 Wash App 531, 859 P2d 1262.

Footnote 90. Godchaux Sugars, Inc. v Ockman, 225 La 599, 73 So 2d 577.

Footnote 91. §§ 96, 97.

Footnote 92. Bowles v Barde Steel Co., 177 Or 421, 164 P2d 692, 162 ALR 328.

Footnote 93. Godchaux Sugars, Inc. v Ockman, 225 La 599, 73 So 2d 577; Bryan v Miller, 73 ND 487, 16 NW2d 275.

Footnote 94. 16 Am Jur 2d, Constitutional Law §§ 212 et seq.

---

## § 59 Jurisdiction over foreign countries

[View Entire Section](#)  
[Go to Parallel Reference Table](#)  
[Go to Supplement](#)

Under the Foreign Sovereign Immunities Act, a foreign state is generally immune from the jurisdiction of state courts. 95 However, exceptions to the general rule of immunity exist where—

—the foreign state has waived its immunity. 96

—the action is based upon a commercial activity carried on in the United States by the foreign state, or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere which causes a direct effect in the United States. 97

—rights in property taken in violation of international law are in issue and such property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state, or such property or any property exchanged for such property is owned or operated by agency or

instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States. 98

—rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue. 99

—the general exception relating to commercial activity is inapplicable and money damages are sought against a foreign state for personal injuries or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his or her office or employment; this exception does not apply to any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion has been abused, nor to any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights. 1

—the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim could have been brought in a United States court, or (D) the foreign state has waived its immunity; 2

—a counterclaim is brought for which the foreign state would not be entitled to immunity had such claim been brought in a separate action against the foreign state, or which arises out of the transaction or occurrence that is the subject matter of the claim of the foreign state, or to the extent the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state. 3

---

## **§ 59 ----Jurisdiction over foreign countries [SUPPLEMENT]**

**Practice Aids:** Long-arm jurisdiction is limited in suits against international firms; Attenuated contacts with state not enough, 17 Pa L Weekly 52:1 (1995).

### **Statutes:**

28 USCS § 1605(a)(7), added in 1996, also excepts acts in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources, as defined, for such an act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency, except that the court will decline to hear a claim under enumerated circumstances. 28 USCS § 1605(e)-(g), were added and provide definitions, a limitation period of 10 years, and limitations on discovery.



## Case authorities:

Commercial activity exception to sovereign immunity applied to give district court jurisdiction of breach of contract action against Iraqi banks since their failure to make payments in U.S. dollars into accounts in New York City as they were contractually bound to do had direct effect in U.S. *Commercial Bank of Kuwait v Rafidain Bank* (1994, CA2 NY) 15 F3d 238, 27 FR Serv 3d 1353.

Secretary's sexual harassment action falls within "commercial activity" exception to foreign sovereign immunity, even though secretary is both citizen of Brazil and of U.S., where she obtained her employment with Brazilian agency here and worked for them here, because nexus between her American citizenship and relationship giving rise to this action is far greater than connection between her concomitant Brazilian citizenship and employment relationship. *Zveiter v Brazilian Nat'l Superintendency of Merchant Marine* (1993, SD NY) 841 F Supp 111, 63 CCH EPD ¶ 42812.

District court exceeded its inherent authority to impose sanctions by enjoining Republic of Philippines from continuing to harass witnesses who had testified against it in suit it had brought in New Jersey, since court failed to balance its own interests with issues of state sovereignty and international comity and to consider less drastic sanctions that did not interpose court into Republic's law enforcement functions. *Republic of the Philippines v Westinghouse Elec. Corp.* (1994, CA3 NJ) 43 F3d 65.

Foreign airplane manufacturer is foreign state under 28 USCS § 1603(b)(2) for purposes of wrongful death/products liability case arising out of 2 separate airplane crashes in Nepal, where negligent acts alleged against manufacturer deal with design and manufacture of aircraft, because more than 50 percent of its stock was owned by (1) France and Spain in 1977, when it sold one allegedly defective plane, and by (2) France, Spain, and Germany in 1987, when it released other allegedly defective plane. *Kern v Jeppesen Sanderson, Inc.* (1994, SD Tex) 867 F Supp 525.

FSIA is applicable where defendant is foreign state (or agency or instrumentality of foreign state) at time lawsuit is filed, irrespective of whether defendant was foreign state at time of injury which gave rise to lawsuit. *Straub v A P Green, Inc.* (1994, CA9 Ariz) 38 F3d 448, 94 CDOS 7908, 94 Daily Journal DAR 14603.

Under FSIA, subject matter jurisdiction plus service of process equals personal jurisdiction. *Transaero, Inc. v La Fuerza Aerea Boliviana* (1994, App DC) 30 F3d 148.

---

## Footnotes

Footnote 95. 28 USCS § 1604.

Footnote 96. 28 USCS § 1605(a)(1).

Footnote 97. 28 USCS § 1605(a)(2).

Footnote 98. 28 USCS § 1605(a)(3).

Footnote 99. 28 USCS § 1605(a)(4).

Footnote 1. 28 USCS § 1605(a)(5).

Footnote 2. 28 USCS § 1605(a)(6).

Footnote 3. 28 USCS § 1607.

**Annotation:** Exceptions to jurisdictional immunity of foreign states and their property under the Foreign Sovereign Immunities Act of 1976 (28 USCS §§ 1602 et seq.), 59 ALR Fed 99.

---

## § 60 Power and duty to determine jurisdiction

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

A court has the power and duty to examine 4 and determine whether it has jurisdiction of a matter presented to it, 5 its determination being subject, of course, to appellate review. 6 This question should be considered by the court before it looks at other matters involved in the case, 7 such as whether the parties are entitled to a jury trial. 8 It may, and must, do this on its own motion, 9 without waiting for the question of its jurisdiction to be raised by any of the parties involved in the proceeding. 10

The "jurisdiction to determine jurisdiction" doctrine authorizes courts to issue ancillary orders while determining their own jurisdiction, and to punish as criminal contempt the violation of such orders, even though it may later be determined that the court lacked jurisdiction over the proceedings. 11 When a court assumes jurisdiction but later discovers that it has no subject matter jurisdiction, the court must take the appropriate action, although it acted in accordance with its previous belief that it had jurisdiction. 12

---

### Footnotes

Footnote 4. *Strother v Day* (Ky) 279 SW2d 785; *Metzger v Turner*, 195 Okla 406, 158 P2d 701.

Footnote 5. *Carmichael v Iowa State Highway Com.* (Iowa) 156 NW2d 332; *Strother v Day* (Ky) 279 SW2d 785; *Niles v Marine Colloids, Inc.* (Me) 249 A2d 277; *Appeal of Matheisel*, 107 NH 479, 224 A2d 832; *Metzger v Turner*, 195 Okla 406, 158 P2d 701; *Bridges v Wyandotte Worsted Co.*, 243 SC 1, 132 SE2d 18; *Fox Park Timber Co. v Baker*, 53 Wyo 467, 84 P2d 736, 120 ALR 1020.

In discovering jurisdictional facts, the courts may consider the complaint, motions, affidavits, or any other evidence. *Perry v Stitzer Buick GMC* (Ind) 637 NE2d 1282, 10 BNA IER Cas 641, reh den (Nov 1, 1994).

Practice References: Discovery of facts relating to jurisdiction and venue. 22 Am Jur Trials 199, The Use of Discovery in Product-Related Burn Injury Cases § 45.

Footnote 6. 4 Am Jur 2d, Appellate Review § 147.

Footnote 7. Kelly v Grimshaw, 161 Kan 253, 167 P2d 627, 11 CCH LC ¶ 63101, 163 ALR 1290; Sheridan County Elec. Coop. v Anahalt, 127 Mont 71, 257 P2d 889; Bridges v Wyandotte Worsted Co., 243 SC 1, 132 SE2d 18.

Footnote 8. Morgan v Hays, 102 Ariz 150, 426 P2d 647, cert den 389 US 859, 19 L Ed 2d 125, 88 S Ct 105; Bridges v Wyandotte Worsted Co., 243 SC 1, 132 SE2d 18.

Footnote 9. Jennings v Jennings, 251 Ala 73, 36 So 2d 236, 3 ALR2d 662; Lyons' Estate, 79 ND 595, 58 NW2d 845.

The issue of jurisdiction is fundamental and primary, and the trial court should determine in every case whether it has jurisdiction. Keizor v Sand Springs Ry. (Okla App) 861 P2d 326.

Footnote 10. Mercantile Bank of Louisiana v Becker (Mo) 40 SW2d 626, 75 ALR 1227.

Footnote 11. Whitehead v Nevada Comm'n on Judicial Discipline, 110 Nev 128, 869 P2d 795, reh den, motion den 110 Nev 380, 873 P2d 946, motion gr, in part on other grounds 110 Nev 874, 878 P2d 913, petition gr, mand gr, motion den, motion to strike den (Nev) 893 P2d 866.

A trial court has the authority to issue orders necessary for the protection of the parties during the time it makes its jurisdictional determination. Malik v Malik, 99 Md App 521, 638 A2d 1184.

Footnote 12. National Bank of Topeka v Mitchell, 154 Kan 276, 118 P2d 519 (trial court's ruling that it lacked jurisdiction to revive action affirmed on appeal).

As to the effect of lack of jurisdiction on orders of court, see § 65.

---

## § 61 Duty to exercise jurisdiction

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

Generally, a court with jurisdiction over a case has not only the right, but also the duty, to exercise that jurisdiction, 13 and to render a decision in a case before it. 14

State courts are not free to decline the jurisdiction conferred on them by Congress in cases based on federal statutes if such cases are within the scope of the ordinary jurisdiction of the state courts as prescribed by local laws. 15 A court's duty to exercise its jurisdiction can be enforced by way of a mandamus proceeding. 16

The general principle that a court which has jurisdiction over a case is bound to exercise that jurisdiction is not without qualification. 17 In certain situations, a court having

jurisdiction over a case can in its discretion decline to exercise it, 18 as when the doctrine of forum non conveniens is applicable. 19

---

## Footnotes

Footnote 13. *Bowles v Barde Steel Co.*, 177 Or 421, 164 P2d 692, 162 ALR 328; *Buckman v United Mine Workers*, 80 Wyo 199, 339 P2d 398, 44 BNA LRRM 2642, 37 CCH LC ¶ 65489, reh den 80 Wyo 216, 342 P2d 236, 44 BNA LRRM 2646, 37 CCH LC ¶ 65625.

Footnote 14. *Buckman v United Mine Workers*, 80 Wyo 199, 339 P2d 398, 44 BNA LRRM 2642, 37 CCH LC ¶ 65489, reh den 80 Wyo 216, 342 P2d 236, 44 BNA LRRM 2646, 37 CCH LC ¶ 65625.

Footnote 15. *Bowles v Barde Steel Co.*, 177 Or 421, 164 P2d 692, 162 ALR 328.

For a discussion of state court jurisdiction over federal causes of action, see § 96.

Footnote 16. 52 Am Jur 2d, Mandamus §§ 307 et seq.

Footnote 17. *Sparrow v Nerzig*, 228 SC 277, 89 SE2d 718, 56 ALR2d 328.

Footnote 18. *Lyon v Lyon* (Ala Civ App) 618 So 2d 127, cert den without op (Ala) 1993 Ala LEXIS 651, appeal after remand, remanded (Ala Civ App) 1994 Ala Civ App LEXIS 614, op withdrawn, substituted op (Ala Civ App) 1995 Ala Civ App LEXIS 20, reh overr (Ala Civ App) 1995 Ala Civ App LEXIS 95 (a state court should not have dismissed for lack of jurisdiction a petition seeking to nullify child visitation orders in another state, when the original order of custody and visitation in the forum state court was entered with proper jurisdiction and petitioner resided in the state; the trial court either had to hear the petition or decline to exercise jurisdiction).

Footnote 19. §§ 130 et seq.

### 3. Invocation of, and Objection to, Jurisdiction [62, 63]

---

#### § 62 Jurisdiction as dependent on application for relief

|  |
|--|
| <p><a href="#">View Entire Section</a><br/><a href="#">Go to Parallel Reference Table</a><br/><a href="#">Go to Supplement</a></p> |
|--|

The general rule is that a court cannot adjudicate a controversy on its own motion; it can do so only when the controversy is presented to it by a party, 20 and only if the case is presented to it in the form of a proper pleading. 21 A court has no power either to investigate facts or to initiate proceedings. 22

When a statute prescribes a mode of acquiring jurisdiction, that mode must be followed or the proceedings 23 and resulting judgment will be void and the judgment subject to collateral attack. 24

---

## **§ 62 ----Jurisdiction as dependent on application for relief [SUPPLEMENT]**

### **Case authorities:**

Defendant did not waive its sovereign immunity by participating in discovery and trial preparation for two years before filing its motion to dismiss on basis of sovereign immunity; language barrier was one reason for delay—both parties were Ecuadorian and all communications and medical records had to be internationally conveyed and translated into English, defendant did not know plaintiff would rely solely on waiver exception to sovereign immunity so it had to conduct discovery to make sure none of other exceptions to immunity applied, it filed its motion within deadline established by district court, it asserted sovereign immunity in both its original and amended answers, and plaintiff was fully aware of defendant's claim to immunity and joined in three motions to extend discovery deadlines to that parties could fully develop facts relating to immunity claim. *Rodriguez v Transnave Inc.* (1993, CA5 Tex) 8 F3d 284.

---

### **Footnotes**

Footnote 20. *Autry v District Court of Muskogee County* (Okla) 459 P2d 865.

Footnote 21. *State ex rel. Houser v Goodman* (Mo App) 406 SW2d 121.

Footnote 22. *Sale v Railroad Com. of California*, 15 Cal 2d 612, 104 P2d 38.

Footnote 23. *State ex rel. Cowan v District Court*, 131 Mont 502, 312 P2d 119.

Footnote 24. *Zarges v Zarges*, 79 NM 494, 445 P2d 97.

For a discussion of judgments void for lack of jurisdiction generally, see 47 Am Jur 2d, Judgments §§ 838 et seq.

---

## **§ 63 Objections to jurisdiction; waiver of, or estoppel to assert, objection**

[View Entire Section](#)  
[Go to Parallel Reference Table](#)  
[Go to Supplement](#)

There can be no valid waiver of an objection that a court lacks jurisdiction over the subject matter, 25 and there can be no estoppel to object on this ground. 26 On the other hand, an objection that the court lacks personal jurisdiction over a party can be defeated by waiver or estoppel. 27 Thus, a party is generally foreclosed from objecting to jurisdiction of the person when he or she has failed to raise the objection at the proper

time, 28 has made a general appearance, 29 in person or by attorney, 30 or has answered the complaint on its merits. 31

An objection to the jurisdiction of the court over a party comes too late when raised for the first time on a motion for new trial, 32 or when raised for the first time before the appellate court. 33 However, an objection based on the ground of absence of jurisdiction over the subject matter must be considered and can be raised at any time. 34

---

## **§ 63 ----Objections to jurisdiction; waiver of, or estoppel to assert, objection [SUPPLEMENT]**

### **Case authorities:**

A defendant asserting lack of personal jurisdiction by special appearance has the burden of negating all bases of jurisdiction. *National Indus. Sand Ass'n v Gibson* (1995, Tex) 897 SW2d 769.

---

### **Footnotes**

Footnote 25. *In re Guardianship of Mikrut* (App) 175 Ariz 544, 858 P2d 689, 147 Ariz Adv Rep 61; *Arkansas State Employees Ins. Advisory Comm. v Estate of Manning*, 316 Ark 143, 870 SW2d 748; *Sadloski v Town of Manchester*, 228 Conn 79, 634 A2d 888, on remand (Conn Super) 1994 Conn Super LEXIS 1583; *In the Interest of W. W. W.*, 213 Ga App 732, 445 SE2d 832, related proceeding 217 Ga App 249, 457 SE2d 217, 95 Fulton County D R 1513; *Fix v Fix* (App) 125 Idaho 372, 870 P2d 1331; *Putnam County Hosp. v Sells* (Ind App) 619 NE2d 968; *Milks v Iowa Oto-Head & Neck Specialists, P.C.* (Iowa) 519 NW2d 801; *Cann v Howard* (Ky App) 850 SW2d 57; *Hunt v Hunt* (Miss) 629 So 2d 548 (ovrld in part on other grounds by *Powell v Powell* (Miss) 644 So 2d 269); *Cross v Director of Revenue* (Mo App) 861 SW2d 214; *In re Marriage of Miller*, 259 Mont 424, 856 P2d 1378; *Rohde v Farmers Alliance Mut. Ins. Co.*, 244 Neb 863, 509 NW2d 618; *Bryan v Miller*, 73 ND 487, 16 NW2d 275; *Indiana Nat'l Bank v State Dep't of Human Servs.* (Okla) 857 P2d 53, subsequent app (Okla) 880 P2d 371, CCH Fed Secur L Rep ¶ 98729; *State ex rel. Children's Servs. Div. v Campbell*, 122 Or App 371, 857 P2d 888, reconsideration den (Oct 13, 1993) and review den 318 Or 61, 865 P2d 1296; *GNOC Corp. v Estate of Rhyne* (SC) 439 SE2d 274; *Barnard v Wassermann* (Utah) 855 P2d 243, 215 Utah Adv Rep 14; *Weisensel v Wisconsin Dep't of Health & Social Servs.* (App) 179 Wis 2d 637, 508 NW2d 33; *Brunsvold v State* (Wyo) 864 P2d 34.

Footnote 26. *Milks v Iowa Oto-Head & Neck Specialists, P.C.* (Iowa) 519 NW2d 801; *In re Estate of Freshour*, 177 Kan 492, 280 P2d 642; *Scherbak v Kissler/Kissler Cash Register Co.*, 245 Neb 10, 510 NW2d 318; *In re Estate of Edinger* (ND) 136 NW2d 114 (superseded by statute on other grounds as stated in *In re Estate of Rohrich* (ND) 496 NW2d 566); *Lucas v Biller*, 204 Va 309, 130 SE2d 582; *Weisensel v Wisconsin Dep't of Health & Social Servs.* (App) 179 Wis 2d 637, 508 NW2d 33.

Footnote 27. *Haygood v Haygood*, 190 Ga 445, 9 SE2d 834, 130 ALR 87; *McKim v Petty*, 242 Iowa 599, 45 NW2d 157; *Bahee v Beem*, 156 Kan 115, 131 P2d 675; *Mississippi Dep't of Human Servs. v Marquis* (Miss) 630 So 2d 331, reh den (Miss) 1994

Miss LEXIS 91; *Miles v Jones*, 197 Okla 684, 173 P2d 949; *In re Estate of Green* (SD) 516 NW2d 326.

Once a timely objection to jurisdiction is raised by a nonresident defendant, affirmative conduct inconsistent with the objection is necessary to support a finding that it has been waived. *Owens v Pollock*, 214 Ga App 107, 447 SE2d 325, cert den (Ga) 1994 Ga LEXIS 1193.

Footnote 28. *Midway Nat'l Bank v Estate of Bollmeier* (Minn App) 504 NW2d 59; *C & H Distribs. v Cloud Enters.* (Mo App) 866 SW2d 927; *Field v Field*, 31 NJ Super 139, 105 A2d 863.

Footnote 29. 5 Am Jur 2d, Appearance § 6.

Footnote 30. 5 Am Jur 2d, Appearance § 10.

Footnote 31. 5 Am Jur 2d, Appearance § 16.

Footnote 32. 58 Am Jur 2d, New Trial § 95.

Footnote 33. 5 Am Jur 2d, Appellate Review § 614.

Footnote 34. *In re Guardianship of Mikrut* (App) 175 Ariz 544, 858 P2d 689, 147 Ariz Adv Rep 61; *Skelton v City of Atkins*, 317 Ark 28, 875 SW2d 504; *Minto v Lambert* (Colo App) 870 P2d 572, cert den (Colo) 1994 Colo LEXIS 299; *Bush v Hawaiian Homes Comm'n*, 76 Hawaii 128, 870 P2d 1272; *Albright v Pyle* (Ind App) 637 NE2d 1360; *Shirley v Pothast* (Iowa) 508 NW2d 712; *In re Pallister's Estate*, 159 Kan 7, 152 P2d 61; *Davis v Ward*, 227 Ky 634, 13 SW2d 782; *Hunt v Hunt* (Miss) 629 So 2d 548 (ovrld in part on other grounds by *Powell v Powell* (Miss) 644 So 2d 269); *In Interest of E.S.* (Mo App) 851 SW2d 676; *In re Marriage of Miller*, 259 Mont 424, 856 P2d 1378; *State ex rel. Children's Servs. Div. v Campbell*, 122 Or App 371, 857 P2d 888, reconsideration den (Oct 13, 1993) and review den 318 Or 61, 865 P2d 1296; *GNOC Corp. v Estate of Rhyne* (SC) 439 SE2d 274; *Mitchell v Porter*, 26 Tenn App 498, 173 SW2d 443; *In re Marriage of Major*, 71 Wash App 531, 859 P2d 1262; *In Interest of MFB* (Wyo) 860 P2d 1140.

**Forms:** Pleas to the jurisdiction. 1 Am Jur Pl & Pr Forms (Rev), Abatement, Revival, and Stay, Forms 61-68.

Notice and motion to dismiss for lack of jurisdiction. 8A Am Jur Pl & Pr Forms (Rev), Dismissal, Discontinuance, and Nonsuit, Forms 91, 96, 97, 99, 101.

Motions to dismiss for lack of jurisdiction over defendant, 19A Am Jur Pl & Pr Forms (Rev), Pleading, Forms 344-346.

#### 4. Defect in Jurisdiction [64, 65]

---

### § 64 Effect of fraud in obtaining personal jurisdiction

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

In a civil case, a court will not exercise jurisdiction which rests on service of process on a defendant who has been decoyed, enticed, or induced to come within the court's reach by any false representation, deceitful contrivance, or wrongful device for which the plaintiff is responsible. 35 The basis for this rule is not that the court did not acquire jurisdiction, but that it should abstain from exercising jurisdiction in view of the unfair manner in which it was procured. 36 If timely objection is made, a court will set aside service of process on a party who has by fraud been brought into the territorial ambit of the trial court's jurisdiction. 37

---

### Footnotes

Footnote 35. *Forbess v George Morgan Pontiac Co.* (La App 2d Cir) 135 So 2d 594; *Zenker v Zenker*, 161 Neb 200, 72 NW2d 809; *Sea-Gate Tire & Rubber Co. v Moseley*, 161 Okla 256, 18 P2d 276.

For the rule in criminal cases, see 21 Am Jur 2d, Criminal Law § 341.

Footnote 36. *Zenker v Zenker*, 161 Neb 200, 72 NW2d 809.

Footnote 37. *Forbess v George Morgan Pontiac Co.* (La App 2d Cir) 135 So 2d 594; *Zenker v Zenker*, 161 Neb 200, 72 NW2d 809.

For a discussion of the territorial limits of jurisdiction, see § 115.

---

## § 65 Effect of lack of jurisdiction

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

The general rule is that proceedings conducted or decisions made by a court are legally void when there is an absence of jurisdiction over the subject matter. 38

A court devoid of jurisdiction over the case cannot make a decision in favor of either party, 39 cannot dismiss the complaint for failure to state a claim, 40 and cannot render a summary judgment, as such a decision would be on the merits of the action. 41 It can only dismiss the case for want of jurisdiction. 42 However, a court can set aside orders it made before the want of jurisdiction was discovered, 43 and a judgment by a court without jurisdiction over the subject matter can be set aside and vacated at any time by the court that rendered it. 44

A decision rendered by a court devoid of jurisdiction can be collaterally attacked, 45 if the jurisdictional defect appears on the face of the record. 46 When lack of jurisdiction



appears on the face of the record or is otherwise clear as a matter of law, a writ of mandamus can issue to correct the unauthorized assumption of jurisdiction. 47 Also, under appropriate circumstances, a writ of prohibition can issue when a court acts without jurisdiction. 48

---

## Footnotes

Footnote 38. *People v Mueller* (Colo App) 851 P2d 211; *Carr v Farmer*, 213 Ga App 568, 445 SE2d 350, 94 Fulton County D R 2247; *Knight v Younkin*, 61 Idaho 612, 105 P2d 456; *Evans v Director of Revenue* (Mo App) 871 SW2d 90; *Wolski v Lippincott*, 147 Neb 944, 25 NW2d 754; *Hermes v Markham*, 78 ND 268, 49 NW2d 238, remanded (ND) 60 NW2d 267; *Salaney v Ferris*, 201 Okla 236, 204 P2d 270 (superseded by statute on other grounds as stated in *In re Porky's Jungle Co.* (Okla App) 813 P2d 549).

The lack of subject matter jurisdiction to render a final judgment cannot be cured retrospectively. *Serrani v Board of Ethics*, 225 Conn 305, 622 A2d 1009.

For a discussion of void and voidable judgments generally, see 46 Am Jur 2d, Judgments §§ 30, 31.

Footnote 39. *Faulkner v University of Tennessee* (Ala) 627 So 2d 362, reh den, without op (Ala) 1993 Ala LEXIS 1382 and cert den (US) 127 L Ed 2d 233, 114 S Ct 943 (court cannot find that it has no authority to adjudicate a claim, and then proceed to adjudicate the claim).

Footnote 40. *Branson v Exide Elecs. Corp.* (Del Sup) 625 A2d 267, on remand, motion gr (Del Ch) CCH Fed Secur L Rep ¶ 97719.

Footnote 41. *Perry v Stitzer Buick GMC* (Ind) 637 NE2d 1282, 10 BNA IER Cas 641, reh den (Nov 1, 1994).

Footnote 42. *Moeller v Moeller*, 175 Kan 848, 267 P2d 536; *Phillips v Bradshaw* (Mo App) 859 SW2d 232; *Wippert v Blackfeet Tribe*, 260 Mont 93, 859 P2d 420; *Blaine Hudson Printing v Utah State Tax Comm'n* (Utah App) 870 P2d 291, 233 Utah Adv Rep 16.

The lack of subject matter jurisdiction precludes the possibility of hearing the case. *Trujillo v Serrano*, 117 NM 273, 871 P2d 369.

Footnote 43. *Hart v Thomasville Motors, Inc.*, 244 NC 84, 92 SE2d 673.

Footnote 44. 47 Am Jur 2d, Judgments § 838.

Footnote 45. 47 Am Jur 2d, Judgments § 933.

Footnote 46. 47 Am Jur 2d, Judgments § 938.

Footnote 47. 52 Am Jur 2d, Mandamus § 312.

Footnote 48. 63A Am Jur 2d, Prohibition § 38.

## B. Classifications [66-90]

### **Research References**

ALR Digest: Courts §§ 214-241, 252-262.5

ALR Index: Jurisdiction

5 Am Jur Trials 1, Whom to Sue—Multiple Defendants

### **1. In General [66-71]**

---

#### **§ 66 Original and appellate jurisdiction**

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

Original jurisdiction is the jurisdiction conferred on or inherent in a court in the first instance. 49 Original jurisdiction means an independent jurisdiction, one not based on or limited to review of another court's judgment or proceeding. 50 It can be distinguished from appellate jurisdiction, which is the jurisdiction of a superior court to review the final judgment, order, or decree of an inferior court 51 on the record made in the inferior tribunal, and to affirm, reverse, dismiss, or modify that decision. 52 A court may have both original and appellate jurisdiction. 53 When a case is tried anew on appeal, the trial of the case by the upper court does not involve the exercise of that court's appellate jurisdiction, but involves the exercise of its original jurisdiction. 54

---

#### **Footnotes**

Footnote 49. In re Constitutionality of House Bill No. 222, 262 Ky 437, 90 SW2d 692, 103 ALR 1085.

Footnote 50. State v Johnson, 100 Utah 316, 114 P2d 1034 (ovrld in part on other grounds by Boyer v Larson, 20 Utah 2d 121, 433 P2d 1015) and (superseded by statute on other grounds as stated in State v Belgard (Utah) 830 P2d 264, 183 Utah Adv Rep 11).

For a discussion of the inherent powers of courts generally, see §§ 43 et seq.

Footnote 51. In re Constitutionality of House Bill No. 222, 262 Ky 437, 90 SW2d 692, 103 ALR 1085.

Footnote 52. State v Johnson, 100 Utah 316, 114 P2d 1034 (ovrld in part on other grounds by Boyer v Larson, 20 Utah 2d 121, 433 P2d 1015) and (superseded by statute on other grounds as stated in State v Belgard (Utah) 830 P2d 264, 183 Utah Adv Rep 11).

Footnote 53. § 72.

---

## § 67 Derivative jurisdiction

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

The term "derivative jurisdiction" generally refers to the jurisdiction of one court being derived from that of another court, and the court with derivative jurisdiction having no more power than that of the other court. 55 The term is usually applied to designate the jurisdiction of an appellate court that derives from the jurisdiction of the court from which the appeal is taken. 56

---

### Footnotes

Footnote 55. Hopkins v Barnhardt, 223 NC 617, 27 SE2d 644.

Footnote 56. State ex rel. Callahan v Hess, 348 Mo 388, 153 SW2d 713; Hopkins v Barnhardt, 223 NC 617, 27 SE2d 644.

---

## § 68 General and limited jurisdiction

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

Frequently distinctions are made between courts of general jurisdiction 57 and courts of limited jurisdiction, 58 Whether a court is of general or limited jurisdiction depends on the nature of the jurisdiction conferred, not on territorial limitations or on the amount in controversy range within which that jurisdiction is to be exercised. 59

A court of general jurisdiction has power to determine all controversies that can possibly be made the subject of civil actions. 60 By contrast, chancery courts are courts of limited jurisdiction. 61

The meaning of the word "limited" as applied to the jurisdiction of courts is relative, since the jurisdiction of a court possessed of "general" jurisdiction is not without limitations. 62 Nevertheless, the scope of jurisdiction of courts said to possess "general jurisdiction" is more extensive than is the scope of jurisdiction of courts said to possess only "limited jurisdiction." 63 For example, a court possessing only limited jurisdiction has no right to create an office not provided for by statute. 64

A court of general jurisdiction can act as a court of limited jurisdiction by exercising special powers conferred on it by statute. When a court of general jurisdiction exercises

such special powers, its decisions are treated as decisions of courts of limited jurisdiction. 65 There is a division of authority as to whether a judgment rendered by a court of general jurisdiction pursuant to special statutory authority is entitled to the customary presumptions regarding the presence of jurisdiction. 66

---

## Footnotes

Footnote 57. *John L. Thuston & Assocs. v FDIC* (Mo App) 869 SW2d 105 (Missouri circuit court is court of general jurisdiction).

Footnote 58. *Jefferson County ex rel. Grauman v Jefferson County Fiscal Court*, 301 Ky 405, 192 SW2d 185; *Salaney v Ferris*, 201 Okla 236, 204 P2d 270 (superseded by statute on other grounds as stated in *In re Porky's Jungle Co.* (Okla App) 813 P2d 549).

Footnote 59. *State v Radcliffe*, 242 Iowa 580, 47 NW2d 175.

Footnote 60. *Bryan v Miller*, 73 ND 487, 16 NW2d 275.

Courts of general jurisdiction have the power to hear and determine all matters, legal and equitable, except insofar as these powers have been expressly denied. *In re Marriage of Major*, 71 Wash App 531, 859 P2d 1262.

Footnote 61. *Clark v Teeven Holding Co.* (Del Ch) 625 A2d 869.

For a discussion of equity jurisdiction generally, see 27 Am Jur 2d, Equity § 5.

Footnote 62. *Bomar v State*, 201 Tenn 480, 300 SW2d 885 (superseded by statute on other grounds as stated in *Sawyers v State* (Tenn) 814 SW2d 725) (that the powers of a court are limited does not necessarily bring that court within the class of limited jurisdiction).

Footnote 63. *Miller v Miller*, 153 Neb 890, 46 NW2d 618.

Footnote 64. *Veith v Dunlap*, 308 Ky 386, 214 SW2d 608.

Footnote 65. *Richard v Director of Revenue* (Mo App) 869 SW2d 913; *Salaney v Ferris*, 201 Okla 236, 204 P2d 270 (superseded by statute on other grounds as stated in *In re Porky's Jungle Co.* (Okla App) 813 P2d 549); *Garner v Garner*, 182 Or 549, 189 P2d 397.

Footnote 66. 46 Am Jur 2d, Judgments § 40.

---

## § 69 Probate jurisdiction

|   |
|---|
| <p><a href="#">View Entire Section</a><br/><a href="#">Go to Parallel Reference Table</a></p> |
|---|

The primary functions of probate courts are adjudicating the validity of wills and other

testamentary instruments and controlling the administration and distribution of estates of decedents, whether they died testate or intestate. 67 When the matter is ancillary to such functions, probate courts may also have general jurisdiction to act. 68 Thus, a probate court can partition property belonging to an estate, 69 supervise the administration of testamentary trusts, 70 and invoke equitable principles in adjudicating all issues which, by the constitution or statute, are expressly confided to its care. 71

Probate courts often have jurisdiction in guardianship proceedings, 72 as in the case of minors 73 or insane, incompetent, and disabled persons, 74 and they sometimes have jurisdiction of adoption proceedings 75 or proceedings to terminate the parent-child relationship. 76

Although probate courts are courts of limited jurisdiction, 77 the judgments of probate courts acting within their jurisdiction are entitled to the same favorable presumptions of regularity and validity as are indulged in favor of the judgments of courts of general jurisdiction. 78

---

## Footnotes

Footnote 67. *Egnatic v Wollard*, 156 Kan 843, 137 P2d 188; *In re Thomson's Estate*, 362 Mo 1043, 246 SW2d 791, 29 ALR2d 1239.

Footnote 68. *Egnatic v Wollard*, 156 Kan 843, 137 P2d 188; *Graves v First Nat'l Bank (ND)* 138 NW2d 584, 14 ALR3d 1205.

See also *Estate of Bissinger*, 60 Cal 2d 756, 36 Cal Rptr 450, 388 P2d 682, 19 ALR3d 506 (although the probate court has no general equity jurisdiction, it has the power to apply equitable and legal principles in aid of its functions as a probate court).

Once competent jurisdiction is obtained by a probate court over an estate, it continues exclusively in that court to all matters pertaining to the settlement of the estate until final distribution. *Stephens v Estate of Campbell (Mo App)* 865 SW2d 411.

Footnote 69. 59A Am Jur 2d, Partition § 103.

Footnote 70. 76 Am Jur 2d, Trusts § 325.

Footnote 71. 27 Am Jur 2d, Equity § 5.

Footnote 72. 39 Am Jur 2d, Guardian and Ward § 24.

Footnote 73. 39 Am Jur 2d, Guardian and Ward § 17.

Footnote 74. 39 Am Jur 2d, Guardian and Ward § 18.

Footnote 75. 2 Am Jur 2d, Adoptions § 111.

Footnote 76. *In re Hatcher*, 443 Mich 426, 505 NW2d 834; *In re Sabrina C.*, 137 NH 445, 629 A2d 782.

Footnote 77. Arkansas Dep't of Human Servs. v Estate of Hogan, 314 Ark 19, 858 SW2d 105, 42 Soc Sec Rep Serv 109.

Footnote 78. 46 Am Jur 2d, Judgments § 41.

---

## § 70 Jurisdiction over subject matter and jurisdiction over parties

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

In order to act in a case, a court must be vested with both jurisdiction over the subject matter and jurisdiction over the parties. 79 Certain presumptions apply only with regard to a judgment rendered by a court that has both jurisdiction over the subject matter and jurisdiction over the parties. 80

Personal jurisdiction refers to the court's authority to adjudicate the claim as to the person. 81 That a court has "jurisdiction of a party" means either that the party has appeared generally and submitted to the jurisdiction, 82 has otherwise waived service of process, 83 or that process has properly issued and been served on such party. 84

"Jurisdiction over the subject matter" has been variously defined as referring to (1) the nature of the cause of action and of the relief sought; 85 (2) the class of cases to which the particular one belongs and the nature of the cause of action and of the relief sought; 86 (3) the power of a court to hear and determine cases of the general class to which the particular one belongs; 87 (4) both the class of cases and the particular subject matter involved; 88 and (5) the competency of the court to hear and decide the case. 89 However, subject matter jurisdiction does not depend on the particular parties in the case or on the manner in which they have stated their claims, nor does it depend on the correctness of any decision made by the court. 90 Also, the location of a transaction or a controversy usually does not determine subject matter jurisdiction. 91

---

### Footnotes

Footnote 79. State ex rel. Cox v Consolidated Independent School Dist., 246 Iowa 566, 68 NW2d 305; Dougan v McGrew, 187 Kan 410, 357 P2d 319, 86 ALR2d 1174; Stewart v Sampson, 285 Ky 447, 148 SW2d 278; Strank v Mercy Hospital of Johnstown, 376 Pa 305, 102 A2d 170; Landers v Jones (Tenn) 872 SW2d 674; Proios v Bokeir, 72 Wash App 193, 863 P2d 1363; McClay v Mid-Atlantic Country Magazine, 190 W Va 42, 435 SE2d 180.

A court must obtain personal jurisdiction over the defendant before it can impose on the defendant personal liability in favor of the plaintiff or deprive the defendant of personal rights. Lohman v Lohman, 331 Md 113, 626 A2d 384.

A court must have subject matter jurisdiction to have the power and authority to decide a controversy, since without it, a court cannot proceed. Burns Chiropractic Clinic v Allstate Ins. Co. (Utah App) 851 P2d 1209, 211 Utah Adv Rep 35.

**Practice References** Jurisdiction over person and subject matter. 5 Am Jur Trials 1, Whom to Sue—Multiple Defendants §§ 10, 11.

Footnote 80. 46 Am Jur 2d, Judgments § 34.

Footnote 81. Landers v Jones (Tenn) 872 SW2d 674.

Personal jurisdiction involves the authority of the court to render judgment over a particular defendant. State ex rel. DePaul Health Ctr. v Mummert (Mo) 870 SW2d 820.

Footnote 82. 5 Am Jur 2d, Appearance §§ 5 et seq.

Footnote 83. 62B Am Jur 2d, Process § 353.

Footnote 84. 62B Am Jur 2d, Process § 4.

Footnote 85. State ex rel. Cairy v Iowa Co-operative Asso., 248 Iowa 167, 79 NW2d 775; Stilwell v Markham, 135 Kan 206, 10 P2d 15; Carlson v Bartels, 143 Neb 680, 10 NW2d 671, 148 ALR 658.

Footnote 86. Santa's Workshop v A.B. Hirschfield Press, Inc. (Colo App) 851 P2d 264; Zeagler v Zeagler, 192 Ga 453, 15 SE2d 478; Groves v Donohue, 254 Iowa 412, 118 NW2d 65; Landers v Jones (Tenn) 872 SW2d 674.

Footnote 87. Weldy v Kline (Ind App) 616 NE2d 398, reh den (Sep 30, 1993) and appeal after remand (Ind App) 1995 Ind App LEXIS 728; Fabricius v Montgomery Elevator Co., 253 Iowa 860, 114 NW2d 297; Saint Joseph Ctr. for Mental Health v County of Douglas (In re Interest of J.T.B.), 245 Neb 624, 514 NW2d 635; Schillerstrom v Schillerstrom, 75 ND 667, 32 NW2d 106, 2 ALR2d 271.

Subject matter jurisdiction does not mean "this case" but "this kind of case". In re Estate of Rougeron, 17 NY2d 264, 270 NYS2d 578, 217 NE2d 639, cert den 385 US 899, 17 L Ed 2d 131, 87 S Ct 204.

Footnote 88. Faulkner v University of Tennessee (Ala) 627 So 2d 362, reh den, without op (Ala) 1993 Ala LEXIS 1382 and cert den (US) 127 L Ed 2d 233, 114 S Ct 943; In re Marriage of Peters (Colo App) 876 P2d 114; J. R. Watkins Co. v Kramer, 250 Iowa 947, 97 NW2d 303; State ex rel. Lambert v Flynn, 348 Mo 525, 154 SW2d 52; Hoffmann v Jinks, 134 NJ Eq 91, 33 A2d 874; Peisker v Chavez, 46 NM 159, 123 P2d 726.

Footnote 89. Rummel v Rummel, 33 Conn App 214, 635 A2d 295 (only if a court has no competence to hear an action does it lack subject matter jurisdiction).

Subject matter jurisdiction is conferred by the constitution and statutes, and relates to the power of a court to adjudicate an issue, while competency pertains to the court's power to exercise its subject matter jurisdiction. In re Guardianship of Agnes T. (App) 179 Wis 2d 363, 507 NW2d 373, review gr (Wis) 513 NW2d 405 and affd 189 Wis 2d 520, 525 NW2d 268.

Footnote 90. Pivarnik v Northern Ind. Pub. Serv. Co. (Ind) 636 NE2d 131.

Footnote 91. *Mission Medical Group, P.A. v Filley* (Mo App) 879 SW2d 743.

As to jurisdiction over local and transitory actions, see §§ 82 et seq.

---

## § 71 Exclusive and concurrent jurisdiction

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

A court may have exclusive jurisdiction to adjudicate particular kinds of cases, 92 or its jurisdiction may be concurrent with the jurisdiction of another court. 93 In some courts, jurisdiction exists when there is a lack of exclusive jurisdiction elsewhere. 94 The mere grant of jurisdiction to a certain court, by constitution or legislation, does not create exclusive jurisdiction in that court in the absence of a specific provision to that effect. 95 In certain cases, common-law and equity jurisdiction may be concurrent. 96

A conflict between constitutional provisions and statutes governing jurisdiction must be resolved in favor of constitutionality. 97

In an appropriate case, a writ of prohibition will issue to prevent one court from interfering with the exclusive jurisdiction of another court. 98

---

### Footnotes

Footnote 92. *Hooper v Missouri P. R. Co.*, 206 Ark 821, 177 SW2d 755; *In re Pallister's Estate*, 159 Kan 7, 152 P2d 61.

The "exclusive jurisdiction" over children conferred on the juvenile court is among the lesser powers of the court and is referred to as the competency of the court to adjudicate a specific case. *State v Jermaine T. J.* (App) 181 Wis 2d 82, 510 NW2d 735.

As to the effect of an agreement purporting to make jurisdiction of certain courts exclusive, see § 101.

As to exclusive and concurrent jurisdiction as between federal and state courts, see § 97.

As to the priority principle, which controls the exercise of jurisdiction when two or more courts have concurrent jurisdiction, see §§ 91 et seq.

Footnote 93. *Phillips v Moeller*, 147 Conn 482, 163 A2d 95; *Watts v Watts*, 151 Kan 125, 98 P2d 125; *Johnson v Washburn*, 146 Neb 335, 19 NW2d 563, 167 ALR 1238; *Haley v Doochin*, 186 Tenn 137, 208 SW2d 756; *Stacy v Mullins*, 185 Va 837, 40 SE2d 265, 168 ALR 636; *Syver v Hahn*, 6 Wis 2d 154, 94 NW2d 161.

Footnote 94. *West Memphis Sch. Dist. No. 4 v Circuit Court*, 316 Ark 290, 871 SW2d 368 (circuit courts have jurisdiction to hear civil cases, absent a provision for exclusive



jurisdiction of a particular matter in another venue).

Footnote 95. *Home Bank v Becker*, 48 Wis 2d 1, 179 NW2d 855.

Maryland Uniform Estate Tax Apportionment Act did not abrogate jurisdiction of circuit courts to apportion estate tax liability. Instead, circuit courts had concurrent jurisdiction with orphans' courts. *Shepter v Johns Hopkins Univ.*, 334 Md 82, 637 A2d 1223.

Footnote 96. 27 Am Jur 2d, Equity § 10.

Footnote 97. *State ex rel. Neely v Brown*, 177 Ariz 6, 864 P2d 1038, 154 Ariz Adv Rep 3 (Arizona Constitution gives superior court original jurisdiction in cases which the amount in controversy exceeds \$1,000; thus, superior court retains concurrent jurisdiction in forfeiture cases in which property is valued between \$1,000 and \$5,000, despite statute which grants justice court exclusive jurisdiction in civil cases involving \$5,000 or less).

As to the general rule regarding statutory construction in favor of constitutionality, see 16 Am Jur 2d, Constitutional Law § 219.

Footnote 98. 63A Am Jur 2d, Prohibition § 49.

## **2. Original Jurisdiction of Appellate Courts [72-79]**

### **a. In General [72-74]**

---

#### **§ 72 Source of jurisdiction**

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

A court whose jurisdiction is confined to the determination of questions on appeal has no authority to determine them in an original proceeding. 99 However, in certain cases a court functioning primarily as an appellate court, especially if it is the highest court of the jurisdiction, exercises original jurisdiction. 1 This may be authorized by constitutional provision, 2 or by statute. 3 Original jurisdiction may also be derived from a court's inherent powers. 4

---

#### **Footnotes**

Footnote 99. *Rogers v Leahy*, 296 Ky 44, 176 SW2d 93, 149 ALR 1267.

Footnote 1. *Sidell v Hill* (Ky) 357 SW2d 318, cert dismd 371 US 802, 9 L Ed 2d 46, 83 S Ct 14; *Jones v Freeman*, 193 Okla 554, 146 P2d 564, cert den 322 US 717, 88 L Ed 1558, 64 S Ct 1288.

Footnote 2. *Sidell v Hill* (Ky) 357 SW2d 318, cert dismd 371 US 802, 9 L Ed 2d 46, 83 S Ct 14; *Board of Comm'rs v Keen*, 194 Okla 593, 153 P2d 483.

Footnote 3. *Sidell v Hill* (Ky) 357 SW2d 318, cert dismd 371 US 802, 9 L Ed 2d 46, 83 S Ct 14.

Footnote 4. *Smith v State Bar* (2nd Dist) 212 Cal App 3d 971, 261 Cal Rptr 24 (challenge to state bar admission fees should be brought in state Supreme Court pursuant to Supreme Court's inherent power and original jurisdiction over bar admissions process).

As to inherent powers generally, see §§ 43 et seq.

---

## § 73 Issuance of remedial writs

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

State constitutions often vest in the highest court of the state original jurisdiction to issue remedial writs, especially the common-law writs of habeas corpus, 5 mandamus 6 or prohibition, 7 or quo warranto, 8 and also other remedial writs, such as writs of injunction. 9 The jurisdiction granted to the highest court by such a constitutional provision is not exclusive, but concurrent with that of other courts also authorized to issue such writs. 10

---

### Footnotes

Footnote 5. *Schaff v Kennelly* (ND) 69 NW2d 777; *Board of Comm'rs v Keen*, 194 Okla 593, 153 P2d 483.

As to jurisdiction to issue writs of habeas corpus, see 39 Am Jur 2d, Habeas Corpus §§ 105 et seq.

Footnote 6. *Mead v Arnell*, 117 Idaho 660, 791 P2d 410; *State ex rel. Rayl v Hettinger County* (ND) 467 NW2d 98.

As to jurisdiction to issue writs of mandamus, see 52 Am Jur 2d, Mandamus §§ 12 et seq.

Footnote 7. *Mead v Arnell*, 117 Idaho 660, 791 P2d 410.

But see *In re Petition for Writ of Prohibition*, 312 Md 280, 539 A2d 664 (appellate court could not issue writs of mandamus and prohibition in exercise of original jurisdiction).

As to jurisdiction to issue writs of prohibition, see 63A Am Jur 2d, Prohibition §§ 74 et seq.

Footnote 8. *Schaff v Kennelly* (ND) 69 NW2d 777; *Board of Comm'rs v Keen*, 194 Okla

593, 153 P2d 483.

As to jurisdiction to issue writs of quo warranto, see 65 Am Jur 2d, Quo Warranto §§ 49 et seq.

Footnote 9. 42 Am Jur 2d, Injunctions § 253.

Footnote 10. Atchison, T. & S. F. Ry. v State Corp. Comm'n, 43 NM 503, 95 P2d 676.

---

## § 74 Grounds for exercise

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

An appellate court's exercise of original jurisdiction is generally discretionary. 11 The court will not exercise such discretion as a matter of course in every case, but rather will resort to that power only when there are good reasons for doing so. 12 For example, an appellate court may exercise its original jurisdiction when the matter involved is of great public importance, 13 or when the exercise of original jurisdiction is necessary to prevent a denial of justice, 14 or to require a court to vacate orders in excess of its jurisdiction. 15 Ordinarily an appellate court will exercise its original jurisdiction only in a matter affecting a great number of people, and not in a matter of merely local or private interest. 16

◆ Practice guide: A litigant bringing an original proceeding in an appellate court must satisfy the traditional test for standing. 17

---

### Footnotes

Footnote 11. Jones v District Court of Second Judicial Dist. (Colo) 780 P2d 526; State ex rel. Spaeth v Meiers (ND) 403 NW2d 392 (Supreme Court's original jurisdiction could not be invoked as a matter of right).

Exercise of original jurisdiction depends on nature of interests involved. Department of Ecology v State Finance Committee, 116 Wash 2d 246, 804 P2d 1241.

Footnote 12. State ex rel. Williamson v State Election Board, 192 Okla 275, 135 P2d 982.

Footnote 13. Raven v Deukmejian, 52 Cal 3d 336, 276 Cal Rptr 326, 801 P2d 1077, 90 CDOS 9333, 90 Daily Journal DAR 14642, reh den (Cal) 1991 Cal LEXIS 663; State ex rel. Williamson v State Election Board, 192 Okla 275, 135 P2d 982.

Supreme Court would assume jurisdiction over action concerning utility rates where power company could not recover lost revenue if its position proved to be correct and issue as to whether coal fire generator could be included in rate base was of statewide

importance. *Montana Power Co. v Public Serv. Comm'n*, 214 Mont 76, 768 P2d 842, subsequent app 214 Mont 82, 692 P2d 432.

State Supreme Court may exercise original jurisdiction over matters involving constitutionality of statute and expenditure of public funds. *Department of Ecology v State Finance Committee*, 116 Wash 2d 246, 804 P2d 1241.

Footnote 14. *State ex rel. Sluss v Appellate Court of Indiana*, 214 Ind 686, 17 NE2d 824.

Original jurisdiction of state Supreme Court should be exercised only when substantial justice could not be had without it. *Western International v Kirkpatrick (Iowa)* 396 NW2d 359.

Footnote 15. *People ex rel. Smith v County Court of Fremont County*, 106 Colo 95, 102 P2d 476, 128 ALR 1382.

As to supervisory jurisdiction over lower courts, see §§ 75 et seq.

Footnote 16. *Atchison, T. & S. F. Ry. v State Corp. Comm'n*, 43 NM 503, 95 P2d 676.

Footnote 17. *Society of Professional Journalists v Bullock (Utah)* 743 P2d 1166, 65 Utah Adv Rep 8, 14 Media L R 1737, 74 ALR4th 445.

## **b. Supervisory Jurisdiction [75-79]**

---

### **§ 75 Nature and origin of supervisory power**

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

Supervisory jurisdiction, or the power of superintending control, 18 over courts of lower rank 19 is a kind of original jurisdiction 20 frequently conferred on appellate courts, especially the highest court of the jurisdiction. 21

The concept of supervisory jurisdiction of certain appellate courts is historically derived from the common law and associated with superior as distinguished from inferior courts. 22 Such jurisdiction is frequently recognized by constitutional provisions. 23 When superintending control over all inferior courts is conferred by a provision of the constitution, that supervisory power generally cannot be restricted or removed by legislative action. 24

The power of superintendence over inferior courts may also be established by statute. 25

---

### **Footnotes**

Footnote 18. *Commonwealth ex rel. Breckinridge v Wise (Ky)* 351 SW2d 493; *State ex*

rel. *Tillman v District Court*, 101 Mont 176, 53 P2d 107, 103 ALR 376.

Footnote 19. *In re Huff*, 352 Mich 402, 91 NW2d 613; *Schaff v Kennelly* (ND) 69 NW2d 777; *Harris Foundation, Inc. v District Court of Pottawatomie County*, 196 Okla 222, 163 P2d 976, 162 ALR 272.

Power of superintending control can only be exercised with respect to inferior courts and tribunals. *Barham v Workers' Compensation Appeal Bd.*, 184 Mich App 121, 457 NW2d 349, app dismd (Mich) 1990 Mich LEXIS 3330.

Footnote 20. *Schaff v Kennelly* (ND) 69 NW2d 777; *State ex rel. Williamson v State Election Board*, 192 Okla 275, 135 P2d 982.

Original jurisdiction of state Supreme Court is limited to supervision of inferior judicial tribunals. *Western International v Kirkpatrick* (Iowa) 396 NW2d 359.

Footnote 21. *Commonwealth ex rel. Breckinridge v Wise* (Ky) 351 SW2d 493; *State ex rel. St. Louis Public Service Co. v McMullan* (Mo) 297 SW2d 431, 62 ALR2d 1281; *Board of Comm'rs v Keen*, 194 Okla 593, 153 P2d 483.

Footnote 22. *Sidell v Hill* (Ky) 357 SW2d 318, cert dismd 371 US 802, 9 L Ed 2d 46, 83 S Ct 14.

Footnote 23. *Sidell v Hill* (Ky) 357 SW2d 318, cert dismd 371 US 802, 9 L Ed 2d 46, 83 S Ct 14; *Twenty-First Judicial Dist. Court v State* (La) 548 So 2d 1208; *In re Huff*, 352 Mich 402, 91 NW2d 613; *State ex rel. Williamson v State Election Board*, 192 Okla 275, 135 P2d 982; *State ex rel. Swan v Elections Bd.*, 133 Wis 2d 87, 394 NW2d 732.

Footnote 24. *State ex rel. Tuscano v Donnelly* (La) 491 So 2d 1341; *In re Huff*, 352 Mich 402, 91 NW2d 613.

Footnote 25. *Planned Parenthood League v Operation Rescue*, 406 Mass 701, 550 NE2d 1361, later proceeding 417 Mass 467, 631 NE2d 985, summary op at (Mass) 22 M.L.W. 1638 and cert den (US) 130 L Ed 2d 122, 115 S Ct 188.

---

## § 76 Other jurisdiction of appellate court distinguished

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

The supervisory jurisdiction of an appellate court is distinct from other kinds of jurisdiction vested in it, <sup>26</sup> especially its appellate jurisdiction. <sup>27</sup> Because of the difference between appellate and supervisory jurisdiction, any limitation on the appellate jurisdiction of a court generally does not affect its supervisory jurisdiction. <sup>28</sup>

In dealing with a constitutional provision giving the state's highest court power to issue extraordinary writs and also a general superintending control over all inferior courts, the jurisdiction to issue those extraordinary writs and the jurisdiction to exercise

superintending control over inferior courts, while distinct, are closely related, and it is not always easy to note the line of demarcation between the two. 29

---

## Footnotes

Footnote 26. *In re Huff*, 352 Mich 402, 91 NW2d 613; *State ex rel. Anaya v Scarborough*, 75 NM 702, 410 P2d 732.

Footnote 27. *Barham v Workers' Compensation Appeal Bd.*, 184 Mich App 121, 457 NW2d 349, app dismd (Mich) 1990 Mich LEXIS 3330; *Washington v Montana Mining Properties*, 243 Mont 509, 795 P2d 460, remanded sub nom *Montana Mining Properties v ASARCO (Mont)* 893 P2d 325; *Schaff v Kennelly (ND)* 69 NW2d 777; *Hayes Freight Lines v Cheatham (Okla)* 277 P2d 664, 48 ALR2d 1278.

Footnote 28. *State ex rel. Mansfield v Crain (Mo App)* 301 SW2d 415.

Footnote 29. *Board of Comm'rs v Keen*, 194 Okla 593, 153 P2d 483.

---

## § 77 Tribunals possessing and subject to power of supervisory control

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

The question of which courts possess superintending control and which courts are subject to such control depends on the organization of the judiciary in the particular jurisdiction. Constitutional provisions generally vest supervisory jurisdiction in the highest court of the state. 30 In some states, the lower appellate courts and even the trial courts may have supervisory jurisdiction over inferior courts. 31 However, in the absence of supervisory authority, courts have no jurisdiction to sanction other courts having parallel jurisdiction. This is true whether the issue is between courts of different judicial districts or between individual judges sitting in the same judicial district. 32

A statute granting an appellate court jurisdiction to issue writs of mandamus to all inferior tribunals does not necessarily confer jurisdiction over administrative bodies, 33 nor is supervisory jurisdiction over administrative bodies conferred by a constitutional provision relating to supervisory jurisdiction over actions and proceedings in lower courts. 34

---

## Footnotes

Footnote 30. *In re Estate of Nuotila*, 360 Mich 256, 103 NW2d 638, 82 ALR2d 923.

Footnote 31. *In re Lafayette Towers*, 200 Mich App 269, 503 NW2d 740 (in Michigan, both circuit court and court of appeals have superintending control over general practices of inferior court, such as small claims court, and can issue order of superintending control when inferior court commits an error of law).

Footnote 32. *People v Proffitt* (Colo App) 865 P2d 929.

Footnote 33. *Atlas Underwriters, Ltd. v State Corp. Com.*, 237 Va 45, 375 SE2d 733 (circuit court had no statutory authority to issue writ of mandamus to State Corporation Commission).

But see *Barham v Workers' Compensation Appeal Bd.*, 184 Mich App 121, 457 NW2d 349, app dismd (Mich) 1990 Mich LEXIS 3330 (appellate court possesses superintending power over administrative agencies acting in judicial or quasi-judicial capacity).

Footnote 34. *State ex rel. Swan v Elections Bd.*, 133 Wis 2d 87, 394 NW2d 732.

---

## § 78 Scope and mode of exercising jurisdiction

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

The scope of supervisory jurisdiction is very broad, 35 and it can be exercised in different ways, depending on the nature of the particular case. 36 Supervisory jurisdiction can be exercised to compel action by an inferior court or to keep an inferior court within its jurisdiction, as by the issuance of a writ of mandamus, 37 a writ of prohibition, 38 or a writ of certiorari. 39 Supervisory jurisdiction can be exercised in the case of a non-jurisdictional error. 40 The power of supervisory control may extend to matters of procedure and administration in the lower courts. 41

---

### Footnotes

Footnote 35. *Schaff v Kennelly* (ND) 69 NW2d 777; *Board of Comm'rs v Keen*, 194 Okla 593, 153 P2d 483.

Footnote 36. *Sidell v Hill* (Ky) 357 SW2d 318, cert dismd 371 US 802, 9 L Ed 2d 46, 83 S Ct 14; *In re Huff*, 352 Mich 402, 91 NW2d 613; *State v Roy*, 40 NM 397, 60 P2d 646, 110 ALR 1.

Footnote 37. 52 Am Jur 2d, Mandamus § 21.

Footnote 38. 63A Am Jur 2d, Prohibition § 4.

Footnote 39. 14 Am Jur 2d, Certiorari § 2.

Footnote 40. *Schaff v Kennelly* (ND) 69 NW2d 777.

In Michigan, superior courts can issue orders of superintending control when inferior courts commit errors of law, or to challenge general practices of inferior courts. In *re Lafayette Towers*, 200 Mich App 269, 503 NW2d 740.

In superintending trial courts, the Supreme Court of Montana can compel appropriate action when the trial court applied a rule in a manner the higher court considers unreasonable. *State ex rel. Ryan v District Court*, 140 Mont 135, 368 P2d 802.

Footnote 41. *Twenty-First Judicial Dist. Court v State (La)* 548 So 2d 1208.

---

## § 79 Grounds for exercise

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

The exercise of supervisory jurisdiction is of discretionary nature, 42 and dependent on the judicial policy prevailing in the given jurisdiction. 43 A court will not lightly use its superintending jurisdiction, 44 and ordinarily will not do so when there is an adequate remedy by appeal or writ of error. 45 However, when a remedy by appeal is not available, or is not adequate to give relief under the particular circumstances, 46 or would come too late for effective redress, 47 the courts will use their supervisory jurisdiction.

Supervisory jurisdiction will not be exercised as a matter of course, but only when there is an urgent reason for its exercise, 48 such as to prevent irreparable mischief or great hardship, 49 to prevent costly delays and unusual burdens of expense, 50 or to achieve justice. 51

---

### Footnotes

Footnote 42. *State Bond Com. v All Taxpayers, Property Owners, & Citizens (La)* 510 So 2d 662; *Planned Parenthood League v Operation Rescue*, 406 Mass 701, 550 NE2d 1361, later proceeding 417 Mass 467, 631 NE2d 985, summary op at (Mass) 22 M.L.W. 1638 and cert den (US) 130 L Ed 2d 122, 115 S Ct 188; *Polum v North Dakota Dist. Court, Southwest Judicial Dist. (ND)* 450 NW2d 761; *Board of Comm'rs v Keen*, 194 Okla 593, 153 P2d 483.

Footnote 43. *State ex rel. Mansfield v Crain (Mo App)* 301 SW2d 415.

Footnote 44. *State ex rel. Anaya v Scarborough*, 75 NM 702, 410 P2d 732.

Appellate court's power of general superintendence over all courts of inferior jurisdiction is to be exercised only in most exceptional circumstances. *Planned Parenthood League v Operation Rescue*, 406 Mass 701, 550 NE2d 1361, later proceeding 417 Mass 467, 631 NE2d 985, summary op at (Mass) 22 M.L.W. 1638 and cert den (US) 130 L Ed 2d 122, 115 S Ct 188.

Issuance of writs under Supreme Court's supervisory jurisdiction will be done rarely and with caution. *Polum v North Dakota Dist. Court, Southwest Judicial Dist. (ND)* 450 NW2d 761.



Footnote 45. *Lexington Loose Leaf Tobacco Warehouse Co. v Coleman*, 289 Ky 277, 158 SW2d 633, 152 ALR 1; *Barham v Workers' Compensation Appeal Bd.*, 184 Mich App 121, 457 NW2d 349, app dismd (Mich) 1990 Mich LEXIS 3330; *State ex rel. Anaya v Scarborough*, 75 NM 702, 410 P2d 732; *Ingalls v Bakken* (ND) 167 NW2d 516; *Harris Foundation, Inc. v District Court of Pottawatomie County*, 196 Okla 222, 163 P2d 976, 162 ALR 272.

Appellate court's power of superintendence over inferior courts will not be resorted to merely as a substitute for normal appellate review. *Planned Parenthood League v Operation Rescue*, 406 Mass 701, 550 NE2d 1361, later proceeding 417 Mass 467, 631 NE2d 985, summary op at (Mass) 22 M.L.W. 1638 and cert den (US) 130 L Ed 2d 122, 115 S Ct 188.

Footnote 46. *Guidry v Shelter Ins. Co.* (La App 3d Cir) 535 So 2d 393; *State ex rel. Crowley v District Court*, 108 Mont 89, 88 P2d 23, 121 ALR 1031; *Schaff v Kennelly* (ND) 69 NW2d 777; *Board of Comm'rs v Keen*, 194 Okla 593, 153 P2d 483.

Footnote 47. *State ex rel. Ampco Metal, Inc. v O'Neill*, 273 Wis 530, 78 NW2d 921, 62 ALR2d 501.

Writ of supervisory control may properly issue where lower court has ordered production of potentially privileged material. *State ex rel. Burlington N. R.R. v District Court*, 239 Mont 207, 779 P2d 885.

Footnote 48. *State ex rel. Crowley v District Court*, 108 Mont 89, 88 P2d 23, 121 ALR 1031.

Footnote 49. *State ex rel. Anaya v Scarborough*, 75 NM 702, 410 P2d 732.

Footnote 50. *State ex rel. Anaya v Scarborough*, 75 NM 702, 410 P2d 732.

Footnote 51. *Ex parte Alabama Textile Products Corp.*, 242 Ala 609, 7 So 2d 303, 141 ALR 87.

### 3. Jurisdiction In Personam and Jurisdiction In Rem [80, 81]

---

#### § 80 Generally

[View Entire Section](#)  
[Go to Parallel Reference Table](#)  
[Go to Supplement](#)

A decision in personam imposes a responsibility or liability on a person directly and binds such individual personally with regard to every property he or she possesses, even that over which the court has no jurisdiction in rem, and which its decision cannot directly affect. 52 On the other hand, a decision in rem does not impose responsibility or liability on a person directly, but operates directly against the property

in question, which is called the "res," irrespective of whether the owner is subject to the jurisdiction of the court in personam. 53 The res may be a status or relation. 54 A judgment in rem affects the interests of all persons in the property in question. 55

A decision in rem can be rendered by a state court only with reference to a res situated in the state, 56 but can be rendered even though the owner is not a resident of the state and process is not personally served on the owner in the state. 57

Jurisdiction in rem is required when the decision sought will directly affect real property. 58 A court of one state has no jurisdiction to establish, 59 or to quiet title to real property situated in another state, 60 or to make any other decision directly affecting real property located in another state, or the title to that real property. 61

A decision in personam can be rendered by the court of a state with regard to a res which is not situated within the state if the decision merely obliges a person subject to its jurisdiction in personam to dispose of the res, or to refrain from disposing of it, in the manner prescribed by the decision. 62 Thus, jurisdiction in personam is a sufficient basis for a decision of a court ordering the defendant to convey an interest in land located outside the territorial ambit of the court's jurisdiction. 63 However, the fact that an action is concerned with real property is not necessarily decisive of whether the jurisdiction involved is in personam or in rem. 64

---

## **§ 80 ----Generally [SUPPLEMENT]**

### **Case authorities:**

Defendant Florida resident had insufficient minimum contacts with North Carolina for the courts of this state to exercise personal jurisdiction over him in an action to recover for defamatory statements allegedly made by defendant about plaintiffs in a Tampa, Florida airport where defendant is a gate agent employed by USAir at the airport; he has never lived in North Carolina and owns no property in this state; he has been in North Carolina only occasionally during the past ten years; and he does not expect to be in this state at any time in the foreseeable future. Jurisdiction may not be established by showing that defendant knew or should have known that he was dealing with residents of the forum state and purposefully directed his conduct toward residents of that state, since defendant must have sufficient contacts with the forum state itself. *Bullard v USAir, Inc.* (1994) 114 NC App 791, 443 SE2d 80.

The "long-arm" statute, G.S. § 1-75.4(5), provided the statutory basis for this state's exercise of personal jurisdiction over the nonresident defendants in plaintiff's action for breach of contract, recovery in quantum meruit, and failure to pay on an open account, and defendants had sufficient contacts with this state so that the exercise of personal jurisdiction over them did not violate due process, where defendants entered into an agreement to purchase a computer system from plaintiff; all of the computer components were shipped from plaintiff's office in Durham; plaintiff spent considerable time in its Durham office designing and engineering defendants' computer system; plaintiff sent installation specialists from Durham to service defendants' computer system and to assist defendants in the operation of the system; defendants contacted plaintiff in Durham for technical support; defendants ordered forms and computer supplies from plaintiff which were shipped from plaintiff's Durham office; and defendants sent payments for such items to plaintiff's Durham office. *Dataflow Cos. v Hutto* (1994) 114 NC App 209, 441

SE2d 580.

The trial court erred by entering an order declaring that plaintiffs are the owners of a Virginia lottery ticket when the ticket was in Virginia when the suit and counterclaim were filed. In rem jurisdiction may not be invoked over property located outside North Carolina; the North Carolina courts do not have the jurisdiction to assert, nor the power to enforce, a decision that some North Carolina party owns a ticket which had been presented to lottery authorities in Virginia and which remains there. *Cole v Hughes* (1994) 114 NC App 424, 442 SE2d 86.

---

## Footnotes

Footnote 52. *Pennoyer v Neff*, 95 US 714, 5 Otto 714, 24 L Ed 565 (not followed as stated on other grounds in *Huffman v Inland Oil & Transport Co.* (5th Dist) 98 Ill App 3d 1010, 54 Ill Dec 306, 424 NE2d 1209) and (ovrld in part on other grounds by *Shaffer v Heitner*, 433 US 186, 53 L Ed 2d 683, 97 S Ct 2569) and (criticized on other grounds as stated in *Mennonite Bd. of Missions v Adams*, 462 US 791, 77 L Ed 2d 180, 103 S Ct 2706).

Footnote 53. *Alpern v Coe*, 352 Pa 208, 42 A2d 542, 161 ALR 1046 (quoting Restatement, Conflict of Laws § 101)

While mere involvement of real property in action does not render such action in rem, an action will be considered in rem where its purpose is to require the court to act directly on property or title to property. *Department of Natural Resources v Antioch Univ.* (Fla App D1) 533 So 2d 869, 13 FLW 2412, appeal after remand (Fla App D4) 647 So 2d 915, 19 FLW D 2506, review den (Fla) 1995 Fla LEXIS 714.

Footnote 54. *Hamm v Hamm*, 30 Tenn App 122, 204 SW2d 113, 175 ALR 523 (marital status or relation is itself a res).

Footnote 55. *Shaffer v Heitner*, 433 US 186, 53 L Ed 2d 683, 97 S Ct 2569 (among conflicting authorities on other grounds noted in *United States v Ten Thousand Dollars (\$10,000.00) in United States Currency* (CA9 Cal) 860 F2d 1511).

Proceedings in rem determine the interests in specific property as against the whole world. *State ex rel. Hill v District Court of Eighth Judicial Dist.*, 79 NM 33, 439 P2d 551.

Footnote 56. *Hanson v Denckla*, 357 US 235, 2 L Ed 2d 1283, 78 S Ct 1228, reh den 358 US 858, 3 L Ed 2d 92, 79 S Ct 10; *Dowdle v Byrd*, 201 Ark 775, 147 SW2d 343.

A Mississippi court could not adjudicate or judicially establish a mechanic's lien against a tractor not situated within the boundaries of the state, since, under state law, a proceeding to establish a mechanic's lien is a proceeding in rem against the property and not a proceeding in personam. *Crawler Parts, Inc. v Laclede Land & Livestock Co.* (Miss) 374 So 2d 798.

Footnote 57. *Bradley v Canter*, 201 Va 747, 113 SE2d 878.

**Annotation:** Long-arm statutes: in personam jurisdiction over nonresident based on ownership, use, possession, or sale of real property, 4 ALR4th 955.

Footnote 58. Travelers Indem. Co. v Cormaney, 258 Iowa 237, 138 NW2d 50 (if court never acquired jurisdiction either in rem or in personam to determine rights to real property, any order, judgment, or decree entered as to property was of no legal effect or force).

Footnote 59. Crocker v Howland, 144 Or 223, 24 P2d 327.

Footnote 60. Durfee v Duke, 375 US 106, 11 L Ed 2d 186, 84 S Ct 242.

Footnote 61. St. Louis Smelting & Refining Co. v Hoban, 357 Mo 436, 209 SW2d 119; Crocker v Howland, 144 Or 223, 24 P2d 327; Hronek v Saint Joseph's Children's Home (Wyo) 866 P2d 1305; Goedmakers v Goedmakers (Fla) 520 So 2d 575, 13 FLW 173.

Footnote 62. Bell v Wadley, 206 Ark 569, 177 SW2d 403; Koehring Co. v Hyde Constr. Co., 254 Miss 214, 178 So 2d 838, sugg of error overr 254 Miss 260, 182 So 2d 580, motion den 254 Miss 260, 184 So 2d 415 and amd on other grounds 254 Miss 258, 182 So 2d 581; St. Louis Smelting & Refining Co. v Hoban, 357 Mo 436, 209 SW2d 119; Wilson v Thelen, 110 Mont 305, 100 P2d 923, cert den 311 US 651, 85 L Ed 417, 61 S Ct 20; State ex rel. Walling v Sullivan, 245 Wis 180, 13 NW2d 550, 154 ALR 841.

Footnote 63. Thompson v Nesheim, 280 Minn 407, 159 NW2d 910.

As to the territorial limits of jurisdiction, see § 115.

Footnote 64. St. Louis Smelting & Refining Co. v Hoban, 357 Mo 436, 209 SW2d 119.

As to local jurisdiction over actions concerning real property, see § 83.

---

## § 81 Jurisdiction quasi in rem

[View Entire Section](#)  
[Go to Parallel Reference Table](#)  
[Go to Supplement](#)

The classification of jurisdiction as in personam or in rem is sometimes not comprehensive enough, 65 and a third category, jurisdiction quasi in rem, is recognized. 66 The term is frequently used to designate an action in personam when the res is indirectly affected by the decision. 67 However, sometimes proceedings affecting a status or relation, for instance a marital status, are referred to as proceedings quasi in rem. 68 Finally, a quasi-in-rem action may be based on a claim for money begun by attachment or other seizure of property when the court has no jurisdiction over the person of the defendant but has jurisdiction over a thing belonging to the defendant or over a person who either is indebted or owes a duty to the defendant. 69

Although a judgment in rem affects the interests of all persons in designated property, 70

a judgment quasi in rem affects the interests of particular persons in designated property and refers to actions in which the plaintiff is seeking to secure a pre-existing claim in the subject property and to extinguish or establish the non-existence of similar interests of particular persons, and to actions in which the plaintiff seeks to apply what he or she concedes to be the property of the defendant to the satisfaction of a claim against the defendant. 71 Since sufficient minimum contacts 72 is the standard for determining whether jurisdiction exists over in personam, or in rem, or quasi in rem, bringing the defendant's property within the jurisdiction of the court by prejudgment attachment is not a due process prerequisite for jurisdiction quasi in rem. 73

---

## **§ 81 ----Jurisdiction quasi in rem [SUPPLEMENT]**

### **Case authorities:**

The trial court erred by entering an order declaring that plaintiffs are the owners of a Virginia lottery ticket when the ticket was in Virginia when the suit and counterclaim were filed. In rem jurisdiction may not be invoked over property located outside North Carolina; the North Carolina courts do not have the jurisdiction to assert, nor the power to enforce, a decision that some North Carolina party owns a ticket which had been presented to lottery authorities in Virginia and which remains there. *Cole v Hughes* (1994) 114 NC App 424, 442 SE2d 86.

---

### **Footnotes**

Footnote 65. *Hanson v Denckla*, 357 US 235, 2 L Ed 2d 1283, 78 S Ct 1228, reh den 358 US 858, 3 L Ed 2d 92, 79 S Ct 10.

Proceedings for the probate of wills are proceedings in rem, although in requiring that all interested persons be made parties, they have also the character of proceedings in personam. *Strother v Day* (Ky) 279 SW2d 785.

Footnote 66. *Bradley v Canter*, 201 Va 747, 113 SE2d 878.

Actions involving receivership, marshaling of assets, administration of trusts, and the like, are quasi in rem. *Sparrow v Nerzig*, 228 SC 277, 89 SE2d 718, 56 ALR2d 328.

Footnote 67. *Hanson v Denckla*, 357 US 235, 2 L Ed 2d 1283, 78 S Ct 1228, reh den 358 US 858, 3 L Ed 2d 92, 79 S Ct 10 (judgment quasi in rem affects interest of particular persons in designated property).

Footnote 68. *Koehring Co. v Hyde Constr. Co.*, 254 Miss 214, 178 So 2d 838, sugg of error overr 254 Miss 260, 182 So 2d 580, motion den 254 Miss 260, 184 So 2d 415 and amd on other grounds 254 Miss 258, 182 So 2d 581; *Hamm v Hamm*, 30 Tenn App 122, 204 SW2d 113, 175 ALR 523.

As to jurisdiction in divorce actions, see 24 Am Jur 2d, Divorce and Separation §§ 232 et seq.

Footnote 69. *Longo v AAA-Michigan* (3d Dist) 201 Ill App 3d 543, 155 Ill Dec 450, 569

NE2d 927 (theory of quasi-in-rem jurisdiction is that the courts have the power to determine the relative rights of the parties because property is situated in the state).

Footnote 70. § 80.

Footnote 71. *Shaffer v Heitner*, 433 US 186, 53 L Ed 2d 683, 97 S Ct 2569 (among conflicting authorities on other grounds noted in *United States v Ten Thousand Dollars* (\$10,000.00) in *United States Currency* (CA9 Cal) 860 F2d 1511).

Proceedings quasi in rem affect only the interest of particular persons in specific property. *State ex rel. Hill v District Court of Eighth Judicial Dist.*, 79 NM 33, 439 P2d 551.

Footnote 72. § 106.

Footnote 73. *Hodge v Hodge*, 178 Conn 308, 422 A2d 280.

In actions quasi in rem the court can obtain jurisdiction over non-resident defendants by a constructive service of process outside the state. *State ex rel. Hill v District Court of Eighth Judicial Dist.*, 79 NM 33, 439 P2d 551.

#### **4. Jurisdiction as to Transitory Actions and Local Actions [82-87]**

---

### **§ 82 Generally**

|   |
|---|
| <p><a href="#">View Entire Section</a><br/><a href="#">Go to Parallel Reference Table</a></p> |
|---|

Jurisdiction in personam and jurisdiction in rem <sup>74</sup> are related to jurisdiction of transitory actions and jurisdiction of local actions, since a court has jurisdiction over a transitory action when it has jurisdiction in personam over the defendant, <sup>75</sup> irrespective of whether the cause of action arose inside or outside the forum state, <sup>76</sup> and even where both parties reside in a state other than that in which cause of action arose. <sup>77</sup> By contrast, jurisdiction over a local action depends on jurisdiction in rem over the property which is directly involved in the decision sought. <sup>78</sup> The nature of a cause of action as transitory or local depends on whether it seeks a decision operating in personam or a decision operating in rem. <sup>79</sup>

In order to determine if an action is transitory or local, the court must look to statutory and common law. <sup>80</sup> Thus, a particular cause of action created by a statute can be made local if the statutory provisions limit actions for enforcement to a particular court. <sup>81</sup>

---

### **Footnotes**

Footnote 74. §§ 80, 81.

Footnote 75. Ex parte Southern Ry. Co. (Ala) 556 So 2d 1082; Forest Products Co. v Magistrelli (Super) 40 Del 525, 14 A2d 397; White v PepsiCo, Inc. (Fla) 568 So 2d 886, 15 FLW S 433, later proceeding (CA11 Fla) 923 F2d 1473; James H. Rhodes & Co. v Chausovsky, 137 NJL 459, 60 A2d 623; Moody v Branson, 192 Okla 327, 136 P2d 925; Federal Land Bank v Davant (App) 292 SC 172, 355 SE2d 293.

Footnote 76. Ex parte Southern Ry. Co. (Ala) 556 So 2d 1082; White v PepsiCo, Inc. (Fla) 568 So 2d 886, 15 FLW S 433, later proceeding (CA11 Fla) 923 F2d 1473; White v PepsiCo, Inc. (Fla) 568 So 2d 886, 15 FLW S 433, later proceeding (CA11 Fla) 923 F2d 1473; Louisville & N. R. Co. v Meredith, 66 Ga App 488, 18 SE2d 51, affd 194 Ga 106, 21 SE2d 101 (criticized on other grounds as stated in Klein v Allstate Ins. Co., 202 Ga App 188, 413 SE2d 777, 102-239 Fulton County D R 11B); Hogevooll v Hogevooll, 117 Mont 528, 162 P2d 218; James H. Rhodes & Co. v Chausovsky, 137 NJL 459, 60 A2d 623; Federal Land Bank v Davant (App) 292 SC 172, 355 SE2d 293.

Footnote 77. Ex parte Southern Ry. Co. (Ala) 556 So 2d 1082; White v PepsiCo, Inc. (Fla) 568 So 2d 886, 15 FLW S 433, later proceeding (CA11 Fla) 923 F2d 1473.

Footnote 78. Taylor v Sommers Bros. Match Co., 35 Idaho 30, 204 P 472, 42 ALR 189.

The distinction between local and transitory actions was recognized at the beginning of the fourteenth century in the common law of England, when the courts developed a distinction between a case that might have arisen anywhere, which was held to be transitory, and one that involved a particular piece of land, which was held to be local. This distinction, which within a short time was embodied in English statutes, has generally been followed in this country. Reasor-Hill Corp. v Harrison, 220 Ark 521, 249 SW2d 994, 30 ALR2d 1213.

Footnote 79. Ely v Smith (DC Kan) 764 F Supp 1413 (applying Kansas law); Bell v Wadley, 206 Ark 569, 177 SW2d 403 (if relief requested operates on land, then proceeding is in rem, hence action is local and must be brought in county where land is situated); Roberts v Cooter, 184 Kan 805, 339 P2d 362, 77 ALR2d 1005 (when judgment is to operate on person of defendant, action is considered transitory rather than local).

Footnote 80. Mission Medical Group, P.A. v Filley (Mo App) 879 SW2d 743, holding that venue statutes have replaced the common law concepts that originally differentiated local and transitory actions.

Footnote 81. Mission Medical Group, P.A. v Filley (Mo App) 879 SW2d 743.

---

## **§ 83 Actions concerning real property; generally**

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

Although an action involving real property is not necessarily local in character when the decision sought is not of a nature to affect the title to real property, 82 it is generally



held that an action which seeks a decision operating directly on real property is local and not transitory in nature. 83 This is also the case when the action involves some interest in real estate, 84 such as ownership of future oil royalty payments. 85

---

## Footnotes

Footnote 82. *Bell v Wadley*, 206 Ark 569, 177 SW2d 403; *Roberts v Cooter*, 184 Kan 805, 339 P2d 362, 77 ALR2d 1005.

Where venue statutes provide that actions affecting title to real estate must be brought in the county where such real estate, or some part thereof, is situated, an action will not be considered local because it affects real estate unless the action will directly affect title. *Mission Medical Group, P.A. v Filley (Mo App)* 879 SW2d 743.

Footnote 83. *Bell v Wadley*, 206 Ark 569, 177 SW2d 403; *Strickland v Humble Oil & Refining Co.*, 194 Miss 194, 11 So 2d 820; *Hogevoll v Hogevoll*, 117 Mont 528, 162 P2d 218; *Miles v Chinto Mining Co.*, 21 Wash 2d 902, 153 P2d 856, adhered to 21 Wash 2d 907, 156 P2d 235.

In action seeking specific performance of agreement to sell real estate, personal jurisdiction existed over non-resident defendant where contract was executed in forum state, regarding sale of real property in forum, and where claim which was subject of complaint arose from that land contract. *Cockerham v Zikratch*, 127 Ariz 230, 619 P2d 739.

As to contract actions involving real property, see § 87.

Footnote 84. *Wilson v Thelen*, 110 Mont 305, 100 P2d 923, cert den 311 US 651, 85 L Ed 417, 61 S Ct 20.

**Annotation:** Long-arm statutes: in personam jurisdiction over nonresident based on ownership, use, possession, or sale of real property, 4 ALR4th 955.

Footnote 85. *Humble Oil & Refining Co. v Copeland (CA4 SC)* 398 F2d 364, 30 OGR 55 (holding that Texas courts, or federal courts sitting in Texas, have exclusive jurisdiction to determine title to real estate within Texas).

---

## § 84 --Injury to real property

|   |
|---|
| <p><a href="#">View Entire Section</a><br/><a href="#">Go to Parallel Reference Table</a></p> |
|---|

The category of local actions traditionally includes actions for injury to real property, 86 particularly actions for trespass on land. 87 However, this rule has been abrogated by statute in some jurisdictions 88 and repudiated by some courts. 89 Thus, in certain jurisdictions, an action for damage to real property need not be brought in the state in which such property is located, where the action does not concern the title to the



---

**Footnotes**

Footnote 86. *Bell v Wadley*, 206 Ark 569, 177 SW2d 403 (state court had no jurisdiction over action for injury to real property when property was situated outside state and no part of tort was committed within state).

Footnote 87. *Ingram v Great Lakes Pipe Line Co.* (Mo App) 153 SW2d 547 (under common law, action for trespass to real estate is considered local and cannot be brought in any state other than where property is situated).

Footnote 88. *Ingram v Great Lakes Pipe Line Co.* (Mo App) 153 SW2d 547.

Footnote 89. *Reasor-Hill Corp. v Harrison*, 220 Ark 521, 249 SW2d 994, 30 ALR2d 1213; *Ingram v Great Lakes Pipe Line Co.* (Mo App) 153 SW2d 547.

Footnote 90. *Mission Medical Group, P.A. v Filley* (Mo App) 879 SW2d 743 (Missouri trial court had jurisdiction over non-local action concerning burning of building in Kansas, since building owner sought only money damages and claim did not directly affect title to real estate).

---

**§ 85 --Severance and removal of personal property from realty**

|   |
|---|
| <p><a href="#">View Entire Section</a><br/><a href="#">Go to Parallel Reference Table</a></p> |
|---|

Though real property is involved, actions for trespass are regarded as transitory where the damages sought are not for injury to the realty, but for the severance and removal of personal property from the land. 91 The position has also been taken, however, that where the action is based both on injury to the real property and on the damage caused by severance and removal of personal property, its character as local or transitory depends on the gravamen of the action, so that when the injury to the real property itself is its gravamen, and the damage caused by severance and removal of personal property is merely an incidental feature of the cause of action, the whole action must be considered as local and not transitory. 92

---

**Footnotes**

Footnote 91. *Ophir Silver Mining Co. v Superior Court of San Francisco*, 147 Cal 467, 82 P 70; *Hodges v Hunter Co.*, 61 Fla 280, 54 So 811; *Laslie v Gragg Lumber Co.*, 184 Ga 794, 193 SE 763, 113 ALR 932; *Brady v Brady*, 161 NC 324, 77 SE 235; *Copper State Mining Co. v Kelvin Lumber & Supply Co.* (Tex Com App) 227 SW 938.

**Annotation:** Jurisdiction of action at law for damages for tort concerning real property in another state or country, 30 ALR2d 1219 § 8.

42 ALR 217.

Footnote 92. *Taylor v Sommers Bros. Match Co.*, 35 Idaho 30, 204 P 472, 42 ALR 189.

**Annotation:** 30 ALR2d 1219 § 8.

42 ALR 217.

---

## § 86 Tort actions

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

An action for tort is generally transitory in nature and can be instituted in any court which has jurisdiction in personam of the defendant, <sup>93</sup> regardless of the place where the cause of action arose. <sup>94</sup> When an action arises from acts or injuries which occurred in more than one state, the question of the specific court in which the action is to be brought is determined in the first instance by reference to local law. <sup>95</sup>

---

### Footnotes

Footnote 93. *White v Pepsico, Inc.* (Fla) 568 So 2d 886, 15 FLW S 433, later proceeding (CA11 Fla) 923 F2d 1473; *Matney v Blue Ribbon, Inc.*, 202 La 505, 12 So 2d 253.

Footnote 94. *White v Pepsico, Inc.* (Fla) 568 So 2d 886, 15 FLW S 433, later proceeding (CA11 Fla) 923 F2d 1473; *Turnbaugh v Dunlop*, 406 Ill 573, 94 NE2d 438.

Footnote 95. 16 Am Jur 2d, Conflict of Laws § 119.

As to minimum contacts for acquiring personal jurisdiction over a non-resident defendant, see § 106.

As to locating the place of tort for purposes of conflict of laws, see 16 Am Jur 2d, Conflict of Laws § 101.

---

## § 87 Contract actions

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

When the cause of action is based on a contract and the action seeks damages on the ground of breach of contract, the action is transitory in nature and may be adjudicated by

any court which has jurisdiction in personam of the defendant, irrespective of where the contract was concluded, and irrespective of where it is to be performed. 96 An action questioning the validity of the assignment of a contract, 97 or seeking cancellation of a contract, 98 is transitory in nature.

The transitory nature of a cause of action based on contract is not affected when real property is incidentally involved. 99 Thus, an action for payment of a promissory note is transitory, even when the note is secured by a mortgage. 1

---

## Footnotes

Footnote 96. *Rose v Delaney* (Ala) 576 So 2d 232; *Reasor-Hill Corp. v Harrison*, 220 Ark 521, 249 SW2d 994, 30 ALR2d 1213; *Forest Products Co. v Magistrelli* (Super) 40 Del 525, 14 A2d 397; *James H. Rhodes & Co. v Chausovsky*, 137 NJL 459, 60 A2d 623.

A subcontractor's claim against a surety under a payment bond was a transitory action that could be tried wherever personal service could be had on the surety, instead of as a local action, when the bond document did not limit the situs where any required or good faith bond payments would be made or where execution could be had. *Harry S. Peterson Co. v National Union Fire Ins. Co.*, 209 Ga App 585, 434 SE2d 778, 93 Fulton County D R 2924.

Footnote 97. *Gibbons v Brimm*, 119 Utah 621, 230 P2d 983.

Footnote 98. *Roberts v Cooter*, 184 Kan 805, 339 P2d 362, 77 ALR2d 1005.

Footnote 99. *Bell v Wadley*, 206 Ark 569, 177 SW2d 403; *Roberts v Cooter*, 184 Kan 805, 339 P2d 362, 77 ALR2d 1005; *Silver Surprise, Inc. v Sunshine Mining Co.*, 74 Wash 2d 519, 445 P2d 334.

Footnote 1. *Hogevoll v Hogevoll*, 117 Mont 528, 162 P2d 218.

## 5. Auxiliary Powers [88-90]

---

### § 88 Ancillary jurisdiction

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

Although the primary jurisdiction of a court is its power to hear and adjudicate the cases brought before it, it also has ancillary jurisdiction to take actions that are incidental to the exercise of its primary jurisdiction. 2 This is implied in the grant of the primary jurisdiction. 3 Thus, a court acquiring jurisdiction over property can determine all questions relative to its title, possession, and control. 4 Also, in the exercise of its ancillary powers, the court can—

- regulate the manner in which a trial is conducted. 5
- direct the disposition of money deposited in the court in the course of the proceeding. 6
- appoint a receiver. 7
- grant an injunction. 8
- grant an attachment or garnishment. 9

---

## Footnotes

Footnote 2. In re Griffin's Estate, 199 Okla 676, 189 P2d 933; Kelley v Kelley, 183 Or 169, 191 P2d 656.

Footnote 3. Kelley v Kelley, 183 Or 169, 191 P2d 656.

Jurisdiction carries with it the power to hear and determine every issue or question properly arising in the case. Maryville v Waters, 207 Tenn 213, 338 SW2d 608.

Provided that a court has jurisdiction over an original action, its jurisdiction continues for purposes of entertaining a motion to modify a judgment. In re Marriage of Parks, 48 Wash App 166, 737 P2d 1316, review den 109 Wash 2d 1006.

Footnote 4. Maryville v Waters, 207 Tenn 213, 338 SW2d 608.

Footnote 5. State ex rel. Rooney v Lake Circuit Court, 236 Ind 345, 140 NE2d 217 (orderly procedure of trial is left to sound legal discretion of court).

Footnote 6. Maryville v Waters, 207 Tenn 213, 338 SW2d 608 (court which has jurisdiction over condemnation proceedings has jurisdiction to adjudicate conflict as to proper distribution of award money deposited in court).

Footnote 7. Hodes v Hodes, 176 Or 102, 155 P2d 564 (appointment of receiver merely auxiliary to primary action).

Footnote 8. 42 Am Jur 2d, Injunctions § 249.

Footnote 9. 6 Am Jur 2d, Attachment and Garnishment § 17.

---

## § 89 Enforcement of decisions

|   |
|---|
| <p style="text-align: center;"><a href="#">View Entire Section</a><br/><a href="#">Go to Parallel Reference Table</a></p> |
|---|

A court that has jurisdiction to make a decision also has the power to enforce it 10 by making such orders and issuing such writs as are necessary to carry its judgment or

decree into effect. 11 For example, it can issue a contempt order 12 or a writ of execution. 13

---

## Footnotes

Footnote 10. *Gland-O-Lac Co. v Franklin County Circuit Court*, 230 Ark 919, 327 SW2d 558; *State Board of Dental Examiners v Savelle*, 90 Colo 177, 8 P2d 693, 82 ALR 1176, app dismd 287 US 562, 77 L Ed 496, 53 S Ct 5; *State ex rel. Brubaker v Pritchard*, 236 Ind 222, 138 NE2d 233, 60 ALR2d 1239; *State v Miller*, 169 Kan 1, 217 P2d 287; *Bednarik v Bednarik*, 18 NJ Misc 633, 16 A2d 80 (disapproved on other grounds as stated in *State v Williams*, 182 NJ Super 427, 442 A2d 620); *Hodes v Hodes*, 176 Or 102, 155 P2d 564.

Footnote 11. *Thompson v Farmers' Exchange Bank*, 333 Mo 437, 62 SW2d 803; *King v King* (Ala Civ App) 636 So 2d 1249, reh overr, without op (Ala Civ App) 1994 Ala Civ App LEXIS 174; *Hodes v Hodes*, 176 Or 102, 155 P2d 564.

For a discussion of enforcement of judgments in general, see 30 Am Jur 2d, Executions and Enforcement of Judgments §§ 1 et seq.

Footnote 12. *Lake-O'-The Woods Club v Martinal*, 239 Ind 31, 154 NE2d 498.

As to authority to issue contempt orders, generally, see 17 Am Jur 2d, Contempt §§ 45 et seq.

Footnote 13. 30 Am Jur 2d, Executions and Enforcement of Judgments § 65.

---

## § 90 Appointment of court assistants

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

Absent constitutional or statutory provisions to the contrary, the power to appoint persons to assist the court is ordinarily inherent in a court. 14 When courts are specifically authorized by legislation to appoint administrative officials, such legislation is not an unconstitutional encroachment by the legislature on the power of the judiciary. 15

---

## Footnotes

Footnote 14. *Jefferson County ex rel. Grauman v Jefferson County Fiscal Court*, 301 Ky 405, 192 SW2d 185; *Board of County Comm'rs v Devine*, 72 Nev 57, 294 P2d 366.

For a discussion of the inherent powers of the court, generally, see §§ 43-45.

Footnote 15. *Board of County Comm'rs v Devine*, 72 Nev 57, 294 P2d 366.

A local rule authorizing the transfer of clerks from the office of the county clerk to the superior court was not in violation of a statute governing the powers and duties of the superior court's administrative officer. *Price v Superior Court* (5th Dist) 186 Cal App 3d 156, 230 Cal Rptr 442 (disapproved on other grounds by *Zumwalt v Superior Court*, 49 Cal 3d 167, 260 Cal Rptr 545, 776 P2d 247).

## **C. Concurrent and Conflicting Jurisdiction [91-98]**

### **Research References**

US Const, Tenth Amendment

28 USCS § 2283

ALR Digest: Courts §§ 307, 311, 313-317

ALR Index: Jurisdiction

### **1. Priority as Controlling Exercise of Concurrent Jurisdiction [91-95]**

---

#### **§ 91 Generally**

[View Entire Section](#)  
[Go to Parallel Reference Table](#)  
[Go to Supplement](#)

The exercise of concurrent jurisdiction is controlled in general by the principle of priority, 16 which is sometimes referred to as the rule of exclusive concurrent jurisdiction. 17 According to this principle, the court which first exercises its jurisdiction acquires exclusive jurisdiction to proceed in the case, even though other courts in the same state have concurrent jurisdiction in the matter. 18 In other words, once a court of concurrent jurisdiction has begun to exercise its jurisdiction over a case, its authority to deal with the action is, subject to appellate review, exclusive until it is completely disposed of, and no other court of concurrent jurisdiction can interfere with the proceedings. 19 Similarly, when a case is transferred or removed from one court to another of concurrent jurisdiction, the jurisdiction of the case is exclusively vested in the court to which the case has been transferred or removed. 20 If the same case is acted on in two or more courts of concurrent jurisdiction, ordinarily the decision first rendered controls and can be pleaded as *res judicata* in the proceeding in any other court of concurrent jurisdiction. 21

Although in the relation between courts of the same jurisdiction the priority principle applies irrespective of whether an action in *rem* or in *personam* is involved, 22 as between federal and state courts the principle applies only to actions in *rem*, but not to actions in *personam*. 23

Although comity is sometimes a motive for the courts to abide by the priority principle, 24 it is a legal duty of a court to abide by the priority principle to reduce the possibility of the conflicting exercise of concurrent jurisdiction, especially to reduce the possibility that a case involving the same subject matter and the same parties is simultaneously acted

on in more than one court. 25 The applicability of the priority rule does not depend on whether one of the two courts of concurrent jurisdiction is superior in rank to the other. 26

The priority principle applies when a law court and an equity court have concurrent jurisdiction. 27

When several courts have concurrent jurisdiction, the plaintiff can select the court in which to bring his or her action, and this choice is binding on the defendant. 28 In some states, the service of process determines priority, 29 while in others, the filing of the complaint, bill, or petition is determinative. 30

---

## **§ 91 ----Generally [SUPPLEMENT]**

### **Case authorities:**

The claims of plaintiffs for negligent infliction of emotional distress and loss of consortium are classified as "injuries to person or property" within the purview of GS § 1-75.4(4) conferring in personam jurisdiction for acts occurring outside North Carolina, provided service activities were carried on within North Carolina, and defendant's own affidavit showed that he picked up or delivered pharmaceuticals in North Carolina on two occasions each week; however, claims of wrongful death and property damage could not be joined in the action alleging negligent infliction of emotional distress and loss of consortium. *Godwin v Walls* (1995) 118 NC App 341, 455 SE2d 473.

The nonresident defendant had sufficient contacts with North Carolina to meet the requirements of due process and to permit the exercise of personal jurisdiction over him where defendant entered into an employment arrangement with a North Carolina based company, purposefully availed himself of the privilege of conducting business here for the purpose of obtaining a financial benefit, and traveled to this state approximately twice weekly over an eight-month period hauling pharmaceuticals for another company with offices in North Carolina. *Godwin v Walls* (1995) 118 NC App 341, 455 SE2d 473.

---

### **Footnotes**

Footnote 16. *Autry v District Court of Muskogee County* (Okla) 459 P2d 865.

For a definition of concurrent jurisdiction, see § 71.

Footnote 17. *Plant Insulation Co. v Fiberboard Corp.* (1st Dist) 224 Cal App 3d 781, 274 Cal Rptr 147.

Footnote 18. *Plant Insulation Co. v Fiberboard Corp.* (1st Dist) 224 Cal App 3d 781, 274 Cal Rptr 147; *State ex rel. Cox v Lohah* (Okla) 434 P2d 928; *In re Crawford*, 81 SD 331, 135 NW2d 140.

For a discussion of the priority principle as between courts of different states, see § 95.

For a discussion of the priority principle as between state and federal courts, see 32A Am

Jur 2d, Federal Practice and Procedure §§ 1778 et seq.

Footnote 19. *Ex parte Liberty Nat'l Life Ins. Co.* (Ala) 631 So 2d 865; *Pivarnik v Northern Ind. Pub. Serv. Co.* (Ind) 636 NE2d 131; *Egnatic v Wollard*, 156 Kan 843, 137 P2d 188; *State v 91st St. Joint Venture*, 330 Md 620, 625 A2d 953; *Wells v Montcalm Circuit Judge*, 141 Mich 58, 104 NW 318; *State ex rel. Flodin v District Court Fifteenth Judicial Dist.*, 222 Minn 546, 25 NW2d 692; *In re Harris* (Okla) 434 P2d 477; *Williamson v Laughlin*, 192 Tenn 580, 241 SW2d 576; *Upton v Heiselt Constr. Co.*, 3 Utah 2d 170, 280 P2d 971; *Weiner v Prudential Ins. Co.*, 110 Vt 22, 1 A2d 708, 118 ALR 1237; *State ex rel. Uland v Uland*, 36 Wash 2d 176, 216 P2d 756; *Brazy v Brazy*, 5 Wis 2d 352, 92 NW2d 738, reh den 5 Wis 2d 362a, 93 NW2d 856.

Conversely, where the court first acquiring jurisdiction consented to the exercise of jurisdiction by another court of concurrent jurisdiction, appellate courts seem invariably to have approved. *Theodore v State* (Alaska) 407 P2d 182, cert den 384 US 951, 16 L Ed 2d 547, 86 S Ct 1570.

Footnote 20. *In re Nichols' Will*, 64 Okla 241, 166 P 1087.

In the absence of statutory authority, a court has no power to transfer a civil case from one court to another having concurrent jurisdiction when original jurisdiction has attached to the former court. *Brown v Kelley*, 260 Iowa 1074, 152 NW2d 275.

Footnote 21. 46 Am Jur 2d, Judgments § 599.

Footnote 22. *Sparrow v Nerzig*, 228 SC 277, 89 SE2d 718, 56 ALR2d 328.

Footnote 23. § 96.

Footnote 24. *Askew v Murdock Acceptance Corp.*, 225 Ark 68, 279 SW2d 557; *State v Bell*, 21 Conn Supp 246, 154 A2d 142; *First M. E. Church v Hull*, 225 Iowa 306, 280 NW 531; *Syver v Hahn*, 6 Wis 2d 154, 94 NW2d 161.

Footnote 25. *Bayard v Martin* (Sup) 34 Del Ch 184, 101 A2d 329, cert den 347 US 944, 98 L Ed 1092, 74 S Ct 639; *Schaeffer v Schaeffer*, 175 Kan 629, 266 P2d 282; *Delaney v Alcorn*, 301 Ky 802, 193 SW2d 404; *In re Gaebler's Estate* (Mo App) 248 SW2d 12 (disapproved on other grounds by *State ex rel. Kincannon v Schoenlaub* (Mo) 521 SW2d 391).

The rule is based on public policies of avoiding conflicts between courts, and preventing vexatious litigation and multiplicity of suits; the rule is established and enforced, not so much to protect the rights of parties, as to protect the rights of courts of coordinate jurisdiction to avoid conflict of jurisdiction, confusion, and delay in the administration of justice. *Plant Insulation Co. v Fiberboard Corp.* (1st Dist) 224 Cal App 3d 781, 274 Cal Rptr 147.

Footnote 26. *Young v Hamilton*, 135 Ga 339, 69 SE 593; *First M. E. Church v Hull*, 225 Iowa 306, 280 NW 531.

Footnote 27. *Askew v Murdock Acceptance Corp.*, 225 Ark 68, 279 SW2d 557.

Footnote 28. *Askew v Murdock Acceptance Corp.*, 225 Ark 68, 279 SW2d 557; *Starke v*



Starke, 155 Kan 331, 125 P2d 738; Brazy v Brazy, 5 Wis 2d 352, 92 NW2d 738, reh den 5 Wis 2d 362a, 93 NW2d 856.

Footnote 29. Mabie v Garden Street Management Corp. (Fla) 397 So 2d 920; State ex rel. Balson v Harnishfeger, 55 Ohio St 2d 38, 9 Ohio Ops 3d 21, 377 NE2d 750.

Footnote 30. State ex rel. Indianapolis Produce Terminal, Inc. v Davis, 243 Ind 55, 182 NE2d 589; State ex rel. Kincannon v Schoenlaub (Mo) 521 SW2d 391.

---

## § 92 Requirement of identity of actions

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

The rule that priority controls exercise of concurrent jurisdiction applies only when the cases involved are identical as to subject matter, parties, and relief sought. 31 This identity must be such that a final adjudication of the case by the court in which it first became pending would, as res judicata, be a bar to further proceeding in a court of concurrent jurisdiction. 32

---

### Footnotes

Footnote 31. Sumitomo Bank v Davis (6th Dist) 4 Cal App 4th 1306, 6 Cal Rptr 2d 381, 92 CDOS 2606, 92 Daily Journal DAR 4085; In re Knight (2d Dist) 63 Ill App 2d 184, 211 NE2d 449; Walker v McNutt, 165 Kan 533, 196 P2d 163; Riddle v Howard (Ky) 357 SW2d 705; State ex rel. Flodin v District Court Fifteenth Judicial Dist., 222 Minn 546, 25 NW2d 692; Upton v Heiselt Constr. Co., 3 Utah 2d 170, 280 P2d 971; Syver v Hahn, 6 Wis 2d 154, 94 NW2d 161.

Footnote 32. Askew v Murdock Acceptance Corp., 225 Ark 68, 279 SW2d 557; Walker v McNutt, 165 Kan 533, 196 P2d 163; State ex rel. Flodin v District Court Fifteenth Judicial Dist., 222 Minn 546, 25 NW2d 692; Autry v District Court of Muskogee County (Okla) 459 P2d 865.

As to res judicata generally, see 46 Am Jur 2d, Judgments §§ 514 et seq.

---

## § 93 Enforcement of priority rule

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

The simultaneous exercise, by two or more courts, of jurisdiction over a case involving the same subject matter and the same parties can be remedied. Such a situation may

result in abatement of the subsequent action. 33 A court may also grant a request for a continuance 34 or a request for a stay 35 on the ground that a proceeding concerning the same case has been commenced in a court of concurrent jurisdiction. The court first assuming jurisdiction can also issue an injunction restraining a party from proceeding in the same case in a court of concurrent jurisdiction. 36 If no injunction has issued and a party has started an action in another court which refuses to abate the action or grant a stay, a court having supervisory jurisdiction over the latter court can grant a writ of prohibition to enforce the priority principle. 37

---

## Footnotes

Footnote 33. *Plant Insulation Co. v Fiberboard Corp.* (1st Dist) 224 Cal App 3d 781, 274 Cal Rptr 147.

Footnote 34. 17 Am Jur 2d, Continuance § 56.

Footnote 35. 1 Am Jur 2d, Actions § 77.

Footnote 36. 42 Am Jur 2d, Injunctions § 203.

Footnote 37. *Crawford v Young* (Okla) 397 P2d 497.

---

## § 94 Where property is involved or receiver has been appointed

|   |
|---|
| <p><a href="#">View Entire Section</a><br/><a href="#">Go to Parallel Reference Table</a></p> |
|---|

When property is the subject of the controversy, the court of concurrent jurisdiction which first exercises judicial control over the property has exclusive jurisdiction. 38 However, the jurisdiction acquired by the court first taking possession is exclusive only insofar as the exercise of this jurisdiction is necessary for the appropriate control and disposition of the property; the other court does not thereby lose its powers to make orders which do not conflict with the authority of the court which has the control thereof. 39

One court cannot interfere with property already in the possession of another court and its appointed receiver. 40

---

## Footnotes

Footnote 38. *Askew v Murdock Acceptance Corp.*, 225 Ark 68, 279 SW2d 557; *In re Knight* (2d Dist) 63 Ill App 2d 184, 211 NE2d 449; *State ex rel. Tuell v Shelby Circuit Court*, 216 Ind 231, 23 NE2d 425, 134 ALR 1238; *Woolley v Shaw*, 192 Okla 107, 136 P2d 398.

In three separate wrongful death actions arising from a single incident in which a

decedent shot and killed his wife and two neighbors and then shot himself, assuming that both courts hearing the matters had jurisdiction over decedent's real estate, the court acting first had exclusive jurisdiction, and second court erred in subsequently vacating the first court's judgment. *Di Prospero v Shelby Mut. Ins. Co.* (Fla App D4) 400 So 2d 177.

Footnote 39. *Bowen v Chemi-Cote Perlite Corp.*, 5 Ariz App 28, 423 P2d 104, vacated on other grounds 102 Ariz 423, 432 P2d 435.

Footnote 40. 65 Am Jur 2d, Receivers § 174.

As to the time when the receivership process of one court binds property to immunize it from interference by another court, see 65 Am Jur 2d, Receivers § 176.

---

## § 95 Qualifications and exceptions to rule of priority

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

The rule of priority does not apply, as a matter of duty, between courts of different states. 41 As a matter of comity, however, a court of one state may stay a proceeding pending before it on the ground that a case involving the same subject matter and the same parties is pending in the court of another state. 42 Also, in view of the full faith and credit clause of the Federal Constitution, 43 once the proceeding on the case has been finally adjudicated by the court of a sister state, *res judicata* effect must be given to it by the court of the forum state. 44

The priority principle operates only as long as the court which first assumed jurisdiction has the case still pending before it; 45 its operation ceases when the litigation terminates. 46

An objection to the forum's exercise of jurisdiction on the ground that the same case has been pending in a court of concurrent jurisdiction cannot be raised when there has been a waiver of that objection, 47 or conduct amounting to an estoppel to raise it. 48

The rule of priority also does not come into operation when the plaintiff cannot obtain from the first court all the relief asked for and to which he or she is entitled. 49 Though the party who invokes the jurisdiction of one of the courts having concurrent jurisdiction is generally bound by his or her election and cannot thereafter bring an action in another tribunal, this is not so when the later suit involves questions that cannot be considered in the earlier one. 50 Moreover, to bring the priority principle into operation in the suit later instituted, the defendant as well as the plaintiff must have a complete opportunity for the adjudication of rights in the suit first instituted. 51

---

### Footnotes

Footnote 41. *Morse v United States*, 267 US 80, 69 L Ed 522, 45 S Ct 209;

Birmingham v M. & W. Mining Co., 163 Kan 66, 180 P2d 615; Smith v Shelter Mut. Ins. Co. (Okla) 867 P2d 1260; Hubbs v Nichols, 201 Tenn 304, 298 SW2d 801; Upton v Heiselt Constr. Co., 3 Utah 2d 170, 280 P2d 971.

The determination of whether to proceed with an action when a similar case is pending in another state is committed to the trial court's discretion. Diet Ctr. v Basford (App) 124 Idaho 20, 855 P2d 481.

When separate actions arising out of the same controversy are commenced in courts in different states, the actions can proceed in each state because the courts do not have concurrent jurisdiction. Saint Paul Surplus Lines Ins. Co. v Mentor Corp. (Minn App) 503 NW2d 511.

Footnote 42. 1 Am Jur 2d, Actions § 78.

Footnote 43. US Const Art 4 § 1.

Footnote 44. Chicago, R. I. & P. R. Co. v Schendel, 270 US 611, 70 L Ed 757, 46 S Ct 420, 53 ALR 1265.

As to the effect of the full faith and credit clause generally, see 16A Am Jur 2d, Constitutional Law § 863.

Footnote 45. Zeagler v Zeagler, 192 Ga 453, 15 SE2d 478; Walker v McNutt, 165 Kan 533, 196 P2d 163.

Footnote 46. Zellner v Zellner, 155 Kan 530, 127 P2d 428.

Footnote 47. State v Van Ness, 109 Vt 392, 199 A 759, 117 ALR 415.

Footnote 48. Zeagler v Zeagler, 192 Ga 453, 15 SE2d 478.

Footnote 49. Askew v Murdock Acceptance Corp., 225 Ark 68, 279 SW2d 557; Walker v McNutt, 165 Kan 533, 196 P2d 163; Delaney v Alcorn, 301 Ky 802, 193 SW2d 404.

Footnote 50. In re Warren (Iowa) 178 NW2d 293 (juvenile court properly assumed jurisdiction of petition to terminate parent-child relationship, after divorce court had first obtained jurisdiction and decreed custody).

Footnote 51. Riddle v Howard (Ky) 357 SW2d 705.

## **2. Jurisdiction As Between State and Federal Courts [96-98]**

---

### **§ 96 Generally**

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

The jurisdiction of federal courts is independent of that conferred by the states on their own courts, and cannot be affected by any legislation except that of the United States. 52 Since the powers not delegated to the United States by the Federal Constitution, nor prohibited by it to the states, are reserved to the states respectively, 53 federal jurisdiction is limited to cases specifically provided for by the Federal Constitution, 54 acts of Congress enacted pursuant to that constitutional authority, 55 and rulings of the United States Supreme Court authoritatively construing those constitutional and statutory provisions of the federal government. In all other cases, state courts have jurisdiction. 56

Although the federal and state court systems are linked to the extent that in certain cases the United States Supreme Court has the power to review a decision rendered by the highest court of the state, 57 state courts are generally independent of the federal courts. 58 For example, a court of the United States cannot grant an injunction to stay proceedings in a state court, except as expressly authorized by acts of Congress, or when necessary in aid of its jurisdiction, or to protect or effectuate its judgment. 59 Also, a federal court ordinarily will not interfere by habeas corpus with the administration of state law by a state court unless fundamental rights guaranteed by the Federal Constitution are invaded, or when the enforcement of state law appears otherwise repugnant to the Constitution, laws, or treaties of the United States. 60 Thus, the orderly administration of justice in a state court is not to be interfered with, except in rare cases when exceptional circumstances exist. 61

---

## § 96 ----Generally [SUPPLEMENT]

### Case authorities:

Only state courts may authoritatively construe state statutes. *BMW of N. Am. v Gore* (1996, US) 134 L Ed 2d 809, 96 CDOS 3490, 96 Daily Journal DAR 5747, 9 FLW Fed S 585.

---

### Footnotes

Footnote 52. 32 Am Jur 2d, Federal Practice and Procedure § 5.

Footnote 53. US Const Tenth Amendment.

As to the powers reserved to the states, generally, see 16 Am Jur 2d, Constitutional Law § 279.

Footnote 54. 32 Am Jur 2d, Federal Practice and Procedure § 1.

Footnote 55. 32 Am Jur 2d, Federal Practice and Procedure § 3.

Footnote 56. *Murray v Wilson Distilling Co.*, 213 US 151, 53 L Ed 742, 29 S Ct 458; *National Surety Corp. v Chamberlain* (DC Tex) 171 F Supp 591 (federal court is presumed to be without jurisdiction unless contrary appears from the record).

As to federal judicial powers generally, see 32 Am Jur 2d, Federal Practice and Procedure §§ 9 et seq.

Footnote 57. 32 Am Jur 2d, Federal Practice and Procedure § 603.

Footnote 58. *Healy v Ratta*, 292 US 263, 78 L Ed 1248, 54 S Ct 700.

When a state exercises power wholly within the domain of state interest, it is insulated from federal judicial review. *South Carolina v Katzenbach*, 383 US 301, 15 L Ed 2d 769, 86 S Ct 803.

Footnote 59. 28 USCS § 2283.

As to injunctions by federal courts against state proceedings generally, see 42 Am Jur 2d, Injunctions §§ 229 et seq.

Footnote 60. 39 Am Jur 2d, Habeas Corpus § 114.

Footnote 61. *United States ex rel. Kennedy v Tyler*, 269 US 13, 70 L Ed 138, 46 S Ct 1.

A United States District Court should not interfere with a state judicial proceeding, unless (1) the District Court finds that the state proceeding is motivated by a desire to harass or is conducted in bad faith, or (2) when a challenged statute is flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it. *Huffman v Pursue, Ltd.*, 420 US 592, 43 L Ed 2d 482, 95 S Ct 1200, reh den 421 US 971, 44 L Ed 2d 463, 95 S Ct 1969.

---

## § 97 Exclusive and concurrent jurisdiction

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

In certain cases federal courts have, in relation to state courts, exclusive jurisdiction, 62 whereas in other cases federal and state courts have concurrent jurisdiction. 63 Thus, state courts have concurrent jurisdiction to decide civil rights claims under 42 USCS § 1983. 64 Similarly, in diversity of citizenship cases, the jurisdiction of federal courts is concurrent with that of state courts, provided the amount involved meets the minimum specified by Congress for an action to be brought in a federal court. 65

For the purpose of considering the propriety of state-court jurisdiction over any particular federal claim, it is presumed that state courts enjoy concurrent jurisdiction. 66 However, the presumption of concurrent jurisdiction among state and federal courts in cases arising under federal law can be rebutted by an explicit statutory directive, 67 by unmistakable implication from legislative history, 68 or by a clear incompatibility between state court jurisdiction and federal interests. 69

When there is concurrent federal and state jurisdiction, as for instance in diversity of citizenship cases, the plaintiff can choose between instituting suit in state court or in federal court. Certain federal statutes, such as the Federal Employers' Liability and Compensation Acts (FELA), 70 and the Employee Retirement Income Security Act (ERISA), 71 expressly grant this option, while other federal statutes imply it. 72

---

## Footnotes

Footnote 62. *Knox Nat'l Farm Loan Asso. v Phillips*, 300 US 194, 81 L Ed 599, 57 S Ct 418, 108 ALR 738 (exclusive jurisdiction over federal farm loan association); *Koppers Co. v Continental Casualty Co.* (CA8 Mo) 337 F2d 499 (exclusive jurisdiction over action on Capehart Act bond).

Footnote 63. *Yellow Freight Sys., Inc. v Donnelly*, 494 US 820, 108 L Ed 2d 834, 110 S Ct 1566, 52 BNA FEP Cas 875, 53 CCH EPD ¶ 39825 (concurrent jurisdiction over employment discrimination actions brought under Title VII of the Civil Rights Act of 1964 (42 USCS §§ 2000e et seq.)); *Tafflin v Levitt*, 493 US 455, 107 L Ed 2d 887, 110 S Ct 792, CCH Fed Secur L Rep ¶ 94880, reh den 495 US 915, 109 L Ed 2d 305, 110 S Ct 1942 (concurrent jurisdiction over civil claims under the Racketeer Influenced and Corrupt Organizations Act (RICO) (18 USCS §§ 1961-1968)).

As to the rule of priority when state and federal courts have concurrent jurisdiction, see § 96.

As to congressional authority to give federal courts exclusive jurisdiction or jurisdiction concurrent with state courts, see 32 Am Jur 2d, Federal Practice and Procedure § 3.

Footnote 64. *Pechiney Corp. v Crystal*, 43 Conn Supp 91, 643 A2d 319; *Tatten Partners, L.P. v New Castle County Bd. of Assessment Review* (Del Super) 642 A2d 1251; *Bell v City of Albany*, 210 Ga App 371, 436 SE2d 87, 93 Fulton County D R 3470; *Dana, Larson, Roubal & Assocs. v Board of Comm'rs* (App) 124 Idaho 794, 864 P2d 632; *Knapp v Junior College Dist.* (Mo App) 879 SW2d 588; *Cox v City of Lynnwood*, 72 Wash App 1, 863 P2d 578.

Footnote 65. *National Surety Corp. v Chamberlain* (DC Tex) 171 F Supp 591.

As to diversity jurisdiction generally, see 32A Am Jur 2d, Federal Practice and Procedure §§ 1261 et seq.

Footnote 66. *Gulf Offshore Co., Div. of Pool Co. v Mobil Oil Corp.*, 453 US 473, 69 L Ed 2d 784, 16 Env't Rep Cas 1175, 101 S Ct 2870, on remand on other grounds (Tex App Houston (14th Dist)) 628 SW2d 171, writ ref n r e (May 5, 1982) and cert den 459 US 945, 74 L Ed 2d 202, 103 S Ct 259 and (criticized on other grounds as stated in *Holmes Fin. Assocs. v Resolution Trust Corp.* (CA6 Tenn) 33 F3d 561).

As to federal question jurisdiction generally, see 32A Am Jur 2d, Federal Practice and Procedure §§ 1590 et seq.

Footnote 67. *Gulf Offshore Co., Div. of Pool Co. v Mobil Oil Corp.*, 453 US 473, 69 L Ed 2d 784, 16 Env't Rep Cas 1175, 101 S Ct 2870, on remand on other grounds (Tex App

Houston (14th Dist)) 628 SW2d 171, writ ref n r e (May 5, 1982) and cert den 459 US 945, 74 L Ed 2d 202, 103 S Ct 259 and (criticized on other grounds as stated in *Holmes Fin. Assocs. v Resolution Trust Corp.* (CA6 Tenn) 33 F3d 561); *Resolution Trust Corp. v Foust* (App) 177 Ariz 507, 869 P2d 183, 134 Ariz Adv Rep 21; *Klickitat County v State*, 71 Wash App 760, 862 P2d 629 (criticized on other grounds by *Tucker v Columbia River Gorge Comm'n*, 73 Wash App 74, 867 P2d 686).

The presumption of concurrent jurisdiction is rebutted when Congress clearly vests federal courts with exclusive jurisdiction. *Simard v Resolution Trust Corp.* (Dist Col App) 639 A2d 540.

Footnote 68. *Gulf Offshore Co., Div. of Pool Co. v Mobil Oil Corp.*, 453 US 473, 69 L Ed 2d 784, 16 Env't Rep Cas 1175, 101 S Ct 2870, on remand on other grounds (Tex App Houston (14th Dist)) 628 SW2d 171, writ ref n r e (May 5, 1982) and cert den 459 US 945, 74 L Ed 2d 202, 103 S Ct 259 and (criticized on other grounds as stated in *Holmes Fin. Assocs. v Resolution Trust Corp.* (CA6 Tenn) 33 F3d 561); *Resolution Trust Corp. v Foust* (App) 177 Ariz 507, 869 P2d 183, 134 Ariz Adv Rep 21. See *Tafflin v Levitt*, 493 US 455, 107 L Ed 2d 887, 110 S Ct 792, CCH Fed Secur L Rep ¶ 94880, reh den 495 US 915, 109 L Ed 2d 305, 110 S Ct 1942 (no evidence in legislative history of RICO that Congress intended to confer exclusive jurisdiction on federal courts).

Footnote 69. *Yellow Freight Sys., Inc. v Donnelly*, 494 US 820, 108 L Ed 2d 834, 110 S Ct 1566, 52 BNA FEP Cas 875, 53 CCH EPD ¶ 39825 (no incompatibility between the procedures provided in Title VII and state court jurisdiction over Title VII claims); *Gulf Offshore Co., Div. of Pool Co. v Mobil Oil Corp.*, 453 US 473, 69 L Ed 2d 784, 16 Env't Rep Cas 1175, 101 S Ct 2870, on remand on other grounds (Tex App Houston (14th Dist)) 628 SW2d 171, writ ref n r e (May 5, 1982) and cert den 459 US 945, 74 L Ed 2d 202, 103 S Ct 259 and (criticized on other grounds as stated in *Holmes Fin. Assocs. v Resolution Trust Corp.* (CA6 Tenn) 33 F3d 561); *Resolution Trust Corp. v Foust* (App) 177 Ariz 507, 869 P2d 183, 134 Ariz Adv Rep 21.

Footnote 70. *Forsyth v Central Foundry Co.*, 240 Ala 277, 198 So 706, 3 CCH LC ¶ 60160.

Footnote 71. *Anderson v HMO Neb., Inc.*, 244 Neb 237, 505 NW2d 700.

Footnote 72. *Tapp v Price-Bass Co.*, 177 Tenn 189, 147 SW2d 107, 3 CCH LC ¶ 60257.

**Annotation:** Supreme Court's views as to state court's concurrent jurisdiction over federal cause of action in absence of federal legislation expressly granting such jurisdiction, 107 L Ed 2d 1182.

---

## § 98 Federal abstention in cases of concurrent federal-state jurisdiction

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

When a party has a choice between state and federal courts and chooses the federal court,



the federal court can, under the doctrine of abstention, order a stay of proceedings, 73 on the ground that if unsettled questions of state law are first decided, the settlement of those questions might end the controversy, and that the decision of the federal questions involved should be deferred until the state law questions are decided in a state court. 74 Such abstention does not involve abdication of federal jurisdiction, but only the postponement of its exercise. 75 It does not interfere with the right of a plaintiff, who has the option between federal and state jurisdiction, to choose the federal jurisdiction; 76 nor does it preclude a litigant, remitted to the state court for decision of the state law issue, from returning to the federal court for determination of the federal questions, unless he or she has waived this right. 77

The doctrine of abstention is equitable in its origins. 78 It is not an automatic rule applied whenever a federal court is faced with a doubtful issue of state law, but rather involves a discretionary exercise of a court's equity powers. 79 Ascertainment of whether there exist the special circumstances prerequisite to application of the doctrine must be made on a case-to-case basis. 80

---

## Footnotes

Footnote 73. 32A Am Jur 2d, Federal Practice and Procedure § 1774.

Footnote 74. 32A Am Jur 2d, Federal Practice and Procedure § 1775.

Footnote 75. *Harrison v NAACP*, 360 US 167, 3 L Ed 2d 1152, 79 S Ct 1025.

Footnote 76. *Sayers v Forsyth Bldg. Corp.* (CA5 Ga) 417 F2d 65.

Footnote 77. *Rankin v Florida* (CA5 Fla) 418 F2d 482, cert den 397 US 1039, 25 L Ed 2d 650, 90 S Ct 1358.

Footnote 78. *Hostetter v Idlewild Bon Voyage Liquor Corp.*, 377 US 324, 12 L Ed 2d 350, 84 S Ct 1293.

Footnote 79. *Baggett v Bullitt*, 377 US 360, 12 L Ed 2d 377, 84 S Ct 1316.

Footnote 80. 32A Am Jur 2d, Federal Practice and Procedure § 1775.

## D. Effect of Agreements Concerning Jurisdiction [99-101]

### Research References

ALR Digest: Courts §§ 13-15

ALR Index: Jurisdiction

---

## § 99 Generally; jurisdiction of subject matter and of parties distinguished

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

In general, the jurisdiction of courts is a public matter that cannot be affected by a private agreement, and the jurisdiction of a court can neither be acquired nor lost as a result of an agreement of the parties. 81 Nevertheless, although jurisdiction over the subject matter cannot be affected by agreement 82 or consent, 83 in civil cases, at least, 84 a court's jurisdiction over the parties may arise from voluntary submission by agreement or consent. 85 Moreover, a court's jurisdiction of the subject matter as well as the parties may be affected by an arbitration agreement which withdraws a matter covered by the agreement from the court until it has first been submitted to and decided by the arbitrators. 86

Consent to jurisdiction over the person can be express or implied in the conduct of the party in question. 87 Those who participate in litigation by asking the court to grant requests beneficial to them submit themselves to the court's jurisdiction. 88

---

**§ 99 ----Generally; jurisdiction of subject matter and of parties distinguished [SUPPLEMENT]**

**Practice Aids:** Choice-of-law clauses: Their effect on extraterritorial analysis—a scholar's dream, a practitioner's nightmare, 28 Creight LR 3:663 (1995).

---

**Footnotes**

Footnote 81. O'Daniel v Inter-Island Resorts, 46 Hawaii 197, 377 P2d 609, 18 ALR3d 555; State ex rel. County Welfare Board v Starke Circuit Court, 238 Ind 35, 147 NE2d 585; State v Christensen, 166 Kan 152, 199 P2d 475; Mercantile Bank of Louisiana v Becker (Mo) 40 SW2d 626, 75 ALR 1227; Hicks v Hamilton (Okla) 283 P2d 1115 (ovrld in part on other grounds by Williams v Egan (Okla) 308 P2d 273); Stretch v Murphy, 166 Or 439, 112 P2d 1018; Miles v Chinto Mining Co., 21 Wash 2d 902, 153 P2d 856, adhered to 21 Wash 2d 907, 156 P2d 235.

Private parties cannot confer on the court powers which it does not possess. CAE Vanguard, Inc. v Newman, 246 Neb 334, 518 NW2d 652, 9 BNA IER Cas 1307.

Footnote 82. State v Albritton, 251 Ala 422, 37 So 2d 640; Gland-O-Lac Co. v Franklin County Circuit Court, 230 Ark 919, 327 SW2d 558; William Beazley Co. v Business Park Assocs., 34 Conn App 801, 643 A2d 1298; Gilmartin v Abastillas, 10 Hawaii App 283, 869 P2d 1346; McKim v Petty, 242 Iowa 599, 45 NW2d 157; City of Jackson v Southard (Mo App) 869 SW2d 280; Wilson v Thelen, 110 Mont 305, 100 P2d 923, cert den 311 US 651, 85 L Ed 417, 61 S Ct 20; Zenker v Zenker, 161 Neb 200, 72 NW2d 809; Hoffmann v Jinks, 134 NJ Eq 91, 33 A2d 874; In re Guardianship of Fox, 212 Or 80, 318 P2d 933 (ovrld in part on other grounds by Hawkins v Hawkins, 264 Or 221, 504 P2d 709) and (superseded by statute on other grounds as stated in Gribkoff v Bedford, 76 Or App 695, 711 P2d 176); Miles v Chinto Mining Co., 21 Wash 2d 902, 153 P2d 856, adhered to 21 Wash 2d 907, 156 P2d 235.

Footnote 83. State v Albritton, 251 Ala 422, 37 So 2d 640; Gilmartin v Abastillas, 10

Hawaii App 283, 869 P2d 1346; *Brown v State*, 219 Ind 251, 37 NE2d 73, 137 ALR 679; *Bair v Blue Ribbon, Inc.*, 256 Iowa 660, 129 NW2d 85; *In re Estate of Freshour*, 177 Kan 492, 280 P2d 642; *Holdsworth v Suchey Holdsworth* (La App 2d Cir) 621 So 2d 71; *Jacobson v Jones*, 236 Miss 640, 111 So 2d 408; *Richard v Director of Revenue* (Mo App) 869 SW2d 913; *Smith v New Hampshire Bd. of Examiners of Psychologists*, 138 NH 548, 645 A2d 651, subsequent app, remanded 139 NH 299, 652 A2d 154; *Bryan v Miller*, 73 ND 487, 16 NW2d 275; *Barrett v Barrett* (Okla) 878 P2d 1051; *Garner v Garner*, 182 Or 549, 189 P2d 397; *American Agricultural Chemical Co. v Thomas*, 206 SC 355, 34 SE2d 592, 160 ALR 594; *Hamm v Hamm*, 30 Tenn App 122, 204 SW2d 113, 175 ALR 523; *Lucas v Biller*, 204 Va 309, 130 SE2d 582.

One cannot voluntarily submit oneself to the subject matter jurisdiction of an improper court. *In the Interest of W. W. W.*, 213 Ga App 732, 445 SE2d 832, related proceeding 217 Ga App 249, 457 SE2d 217, 95 Fulton County D R 1513.

Litigants cannot confer subject matter jurisdiction on a judicial tribunal by either acquiescence or consent. *Richdale Dev. Co. v McNeil Co.*, 244 Neb 694, 508 NW2d 853, mod on other grounds, reh overr, cause remanded 244 Neb 936, 510 NW2d 312.

Footnote 84. As to whether jurisdiction in a criminal case may be obtained by consent, see 21 Am Jur 2d, Criminal Law § 339.

Footnote 85. *Gland-O-Lac Co. v Franklin County Circuit Court*, 230 Ark 919, 327 SW2d 558; *McKim v Petty*, 242 Iowa 599, 45 NW2d 157; *In re Estate of Freshour*, 177 Kan 492, 280 P2d 642; *Leavy v McDermott*, 20 NJ Super 440, 90 A2d 116; *Bryan v Miller*, 73 ND 487, 16 NW2d 275; *Allen v Allen*, 214 Or 664, 330 P2d 151.

A defendant consented to personal jurisdiction in the courts of New York when he signed an agreement to that effect. *Brown v United States Fidelity & Guar. Co.*, 208 Ga App 834, 432 SE2d 256, 93 Fulton County D R 2210.

As to jurisdiction in an agreed case, see 3 Am Jur 2d, Agreed Case § 8.

Footnote 86. 5 Am Jur 2d, Arbitration and Award § 36.

Footnote 87. *Gland-O-Lac Co. v Franklin County Circuit Court*, 230 Ark 919, 327 SW2d 558; *In re Estate of Freshour*, 177 Kan 492, 280 P2d 642; *Wilson v Thelen*, 110 Mont 305, 100 P2d 923, cert den 311 US 651, 85 L Ed 417, 61 S Ct 20; *Leavy v McDermott*, 20 NJ Super 440, 90 A2d 116; *Rosamond v Lucas-Kidd Motor Co.*, 182 SC 331, 189 SE 641.

As to waiver of objection to jurisdiction over party or estoppel to raise it, see § 63.

Footnote 88. *First Wisconsin Nat'l Bank v Donian* (Fla App D2) 343 So 2d 943, cert den (Fla) 355 So 2d 513.

---

## § 100 Agreements excluding adjudication by courts

[View Entire Section](#)

As a general rule, an agreement purporting to completely exclude adjudication by the courts is against public policy and void. 89 However, arbitration agreements withholding jurisdiction from the courts are generally valid and enforceable, not only when a statute specifically so provides, but also in the absence of such a statute. 90

---

## **§ 100 ----Agreements excluding adjudication by courts [SUPPLEMENT]**

### **Case authorities:**

The claims of plaintiffs for negligent infliction of emotional distress and loss of consortium are classified as "injuries to person or property" within the purview of GS § 1-75.4(4) conferring in personam jurisdiction for acts occurring outside North Carolina, provided service activities were carried on within North Carolina, and defendant's own affidavit showed that he picked up or delivered pharmaceuticals in North Carolina on two occasions each week; however, claims of wrongful death and property damage could not be joined in the action alleging negligent infliction of emotional distress and loss of consortium. *Godwin v Walls* (1995) 118 NC App 341, 455 SE2d 473.

---

### **Footnotes**

Footnote 89. *Carbon Black Export, Inc. v The S.S. Monrosa* (CA5 Tex) 254 F2d 297, cert dismd 359 US 180, 3 L Ed 2d 723, 79 S Ct 710, reh den 359 US 999, 3 L Ed 2d 986, 79 S Ct 1115 and (disapproved on other grounds as stated in *Royal Bed & Spring Co. v Famossul Industria E Comercio de Moveis Ltda.* (CA1 Puerto Rico) 906 F2d 45, 123 ALR Fed 739).

Jurisdiction of the courts cannot with certainty be ousted by advance private agreement between the parties. *Hawaii Credit Card Corp. v Continental Credit Card Corp.* (DC Hawaii) 290 F Supp 848.

Footnote 90. 5 Am Jur 2d, Arbitration and Award §§ 29 et seq.

---

## **§ 101 Agreements giving exclusive jurisdiction to certain courts**

Agreements which purport to exclude jurisdiction of courts other than those specifically named and which relate to the adjudication of future controversies are unenforceable in some states. 91 Other states authorize by statute the selection of an exclusive future forum by agreement of the parties. 92 However, the enforceability of such a contractual

provision depends on whether it is fair and reasonable. 93 Factors to be considered when determining the validity of a forum selection clause include disparity of bargaining power between the parties, 94 unconscionability and abuse of economic power, 95 provision for a neutral forum 96 or a forum experienced in deciding the issues, 97 inconvenience, 98 and a public policy that courts be open to every person. 99

An agreement authorizing the adjudication of an existing controversy in a particular court having subject matter jurisdiction is generally a venue agreement, rather than a jurisdictional agreement, and therefore not invalid as affecting jurisdiction. 1

---

## **§ 101 ----Agreements giving exclusive jurisdiction to certain courts [SUPPLEMENT]**

**Practice Aids:** Effect, on application of 28 USCS sec. 1404(a) or forum non conveniens in diversity case, of contractual provision fixing forum for enforcement or laws governing interpretation—post- Bremen cases 123 ALR Fed 323.

---

### **Footnotes**

Footnote 91. *Rindal v Seckler Co.* (DC Mont) 786 F Supp 890, RICO Bus Disp Guide (CCH) ¶ 8032 (forum selection clauses are invalid under Montana law); *Davenport Machine & Foundry Co., etc. v Adolph Coors Co.* (Iowa) 314 NW2d 432, 31 ALR4th 395 (clause which purported to restrict future litigation to Colorado courts was not legally binding in Iowa).

**Annotation:** Validity of contractual provision limiting place or court in which action may be brought, 31 ALR4th 404.

Footnote 92. *First Nat'l Monetary Corp. v Chesney* (ED Mich) 514 F Supp 649 (Michigan statute authorized forum selection under certain conditions); *Haakinson & Beaty Co. v Inland Ins. Co.*, 216 Neb 426, 344 NW2d 454 (forum selection clause accorded with Model Uniform Choice of Forum Act as adopted in Nebraska).

Footnote 93. *Reeves v Chem Industrial Co.*, 262 Or 95, 495 P2d 729.

Footnote 94. *Prudential Resources Corp. v Plunkett* (Ky App) 583 SW2d 97, 63 OGR 486; *Eads v Woodmen of World Life Ins. Soc.* (Okla App) 785 P2d 328.

Fact that forum selection clause was contained in contract of adhesion did not defeat enforcement as a matter of law where there was no evidence of stronger party's unfair use of superior power to impose contract on other party, and covenant as within reasonable expectations of party against whom it was enforced. *Cal-State Business Products & Services, Inc. v Ricoh* (3rd Dist) 12 Cal App 4th 1666, 16 Cal Rptr 2d 417, 93 CDOS 934.

Footnote 95. *First Nat'l Monetary Corp. v Chesney* (ED Mich) 514 F Supp 649 (applying Michigan law).

Footnote 96. *Hauenstein & Bermeister, Inc. v Met-Fab Industries, Inc.* (Minn) 320 NW2d

886.

Footnote 97. Bryant Electric Co. v Fredericksburg (CA4 Va) 762 F2d 1192 (applying Virginia law); Hauenstein & Bermeister, Inc. v Met-Fab Industries, Inc. (Minn) 320 NW2d 886.

Footnote 98. Hauenstein & Bermeister, Inc. v Met-Fab Industries, Inc. (Minn) 320 NW2d 886; Eads v Woodmen of World Life Ins. Soc. (Okla App) 785 P2d 328.

Clause designating local forum was reasonable when, among other factors, events giving rise to lawsuit occurred in state, and many of witnesses were likely to reside there. Bryant Electric Co. v Fredericksburg (CA4 Va) 762 F2d 1192 (applying Virginia law).

Footnote 99. Eads v Woodmen of World Life Ins. Soc. (Okla App) 785 P2d 328.

Forum selection clauses appearing in contracts negotiated freely and voluntarily by parties who have negotiated at arm's length are valid and may be given effect, in the court's discretion and in the absence of a showing that enforcement of such a clause would be unreasonable; the policy favoring access to California courts by resident plaintiffs is satisfied in those cases where a plaintiff has freely and voluntarily negotiated away his right to a California forum. Smith, Valentino & Smith, Inc. v Superior Court of Los Angeles County, 17 Cal 3d 491, 131 Cal Rptr 374, 551 P2d 1206.

Footnote 1. 77 Am Jur 2d, Venue § 8.

As to contracts limiting or fixing venue generally, see 77 Am Jur 2d, Venue §§ 7 et seq.

## **E. Acquisition of Jurisdiction [102-109]**

### **Research References**

ALR Digest: Courts §§ 16-55

ALR Index: Jurisdiction

3 Am Jur Trials 553, Selecting the Forum—Plaintiff's Position

### **1. In General [102-105]**

---

## **§ 102 Generally**

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

In general, a court's acquisition of jurisdiction over a case depends on the facts existing at the time its jurisdiction is invoked. 2 Accordingly, in a civil suit, acquisition of jurisdiction depends on the facts existing at the time of the commencement of the suit 3 as they appear from the complaint or other original pleading of the plaintiff. 4 When, in view of the facts existing at the beginning of the proceedings, the court has acquired

jurisdiction over a case, that jurisdiction is ordinarily not ousted by subsequent events. 5

---

**Footnotes**

Footnote 2. *Collins v Robbins*, 147 Me 163, 84 A2d 536; *Piana v Piana*, 239 SC 367, 123 SE2d 297.

Footnote 3. *Metzger v Turner*, 195 Okla 406, 158 P2d 701.

As to when action is commenced, see 1 Am Jur 2d, Actions § 70.

Footnote 4. *Lippincott v Wolski*, 147 Neb 930, 25 NW2d 747, 169 ALR 1236; *Metzger v Turner*, 195 Okla 406, 158 P2d 701.

Footnote 5. § 111.

---

**§ 103 As related to service of process**

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

Acquisition of jurisdiction over the person of the defendant generally depends on whether service of process has been made in the manner required by law and whether due notice has been given. 6 When jurisdiction depends on proper service, it is the fact of the service, not the proof of service, which gives jurisdiction to the court. 7 The notice required to secure jurisdiction over the person of a party at the commencement of the suit is distinct from the notice of motions and other steps in the proceeding after jurisdiction has been acquired by the court. 8

Generally, service of process is only effective when made strictly pursuant to the method authorized by statutes or rules. 9 However, since it is a personal privilege of a defendant to require that he or she be served with process in a legal manner, the defendant may consent to the jurisdiction of the court without requiring the usual legal formalities as to service of process. 10

---

**Footnotes**

Footnote 6. 62B Am Jur 2d, Process §§ 4, 105.

As to the relationship between process and commencement of action, see 62B Am Jur 2d § 10.

As to service of process in general, see 62B Am Jur 2d, Process §§ 105 et seq.

Footnote 7. 62B Am Jur 2d, Process §§ 318, 320.



Footnote 8. State ex rel. Brubaker v Pritchard, 236 Ind 222, 138 NE2d 233, 60 ALR2d 1239.

Footnote 9. 62B Am Jur 2d, Process §§ 105, 142.

Footnote 10. Jones v Brinson, 238 NC 506, 78 SE2d 334.

---

## **§ 104 --Constructive service**

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

The principal purpose of service of process is to give the party to whom it is addressed actual notice of the proceeding against him. 11 However, in cases when merely constructive service is sufficient, 12 as, for instance, under statutes governing acquisition of jurisdiction over nonresident motorists, 13 the service may be such as not to give the defendant actual notice of the proceedings instituted against him, although constructive service must be such as will make it reasonably probable that the defendant will receive actual notice of the proceeding. 14 Even where service by publication is permitted as a last resort after reasonable diligence has been exercised to locate a defendant for purposes of personal service, service by publication will not establish personal jurisdiction in the absence of such reasonable diligence. 15

---

### **Footnotes**

Footnote 11. 62B Am Jur 2d, Process § 3.

Footnote 12. As to substituted and constructive service, generally, see 62B Am Jur 2d, Process §§ 146 et seq.

Footnote 13. 8 Am Jur 2d Automobiles and Highway Traffic §§ 935 et seq.

Footnote 14. 62B Am Jur 2d, Process § 148.

Footnote 15. Donel, Inc. v Badalian (2nd Dist) 87 Cal App 3d 327, 150 Cal Rptr 855 (trial court erred in denying defendant's motion to vacate judgment for lack of personal jurisdiction where service was made by publication after plaintiff had attempted to locate defendant only by searching telephone directories and did not make inquiries of the attorney who had previously corresponded with counsel for plaintiff on defendant's behalf).

---

## **§ 105 As related to location of defendant or res**

[View Entire Section](#)



The life or force of a process in personam is limited to the territorial jurisdiction of the court that issued it; personal service on a nonresident defendant, outside the jurisdiction of the court, does not suffice to give the court jurisdiction over the person of the defendant. 16 However, if process is served on the defendant while he or she is temporarily within the state, this is generally sufficient for acquisition by a court of that state of jurisdiction in personam over the defendant. 17 For a court to acquire jurisdiction to render a divorce decree, at least one of the parties, husband or wife, must have a domicil, and not merely a temporary residence, within the state. 18

The acquisition of jurisdiction in rem does not depend on whether process was served on the defendant within the state, but depends on whether the res to be directly affected by the decision is located within the borders of the state to which the court belongs, 19 and has been brought within the court's control. 20 However, the court's acquisition of jurisdiction over the property does not draw to it jurisdiction over the person of the owner residing in another state. 21

When acquisition of jurisdiction in rem is concerned, the question arises as to where intangible property has its location. Although jurisdiction over an intangible can only arise from control or power over the persons whose relationships are the source of the rights and obligations, 22 and intangible personal property, in contemplation of law, accompanies the person of the owner, 23 the conflict of laws principle according to which the situs of personal property is at the domicil of its owner is a fiction that does not apply when the situs of property is determinative of the existence or nonexistence of jurisdiction in rem, 24 and the location to be assigned to intangible property which has no physical characteristics that make it possible to assign it to a particular locality depends on what action is to be taken. 25

---

## Footnotes

Footnote 16. 62B Am Jur 2d, Process § 305.

Footnote 17. 62B Am Jur 2d, Process § 307.

Footnote 18. 24 Am Jur 2d, Divorce and Separation § 238.

As to jurisdiction to determine child custody and visitation rights as dependent on residence of parties and child, see 24 Am Jur 2d, Divorce and Separation § 964.

Footnote 19. § 80.

Footnote 20. 62B Am Jur 2d, Process § 172.

Footnote 21. 62B Am Jur 2d, Process § 74.

As to the necessity of satisfying the "minimum contacts" requirement in cases involving the ownership, use, possession, or sale of real property in the forum state, see § 109.

Footnote 22. *Estin v Estin*, 334 US 541, 92 L Ed 1561, 68 S Ct 1213, 1 ALR2d 1412.

For a discussion of the nature of intangible property, see 63A Am Jur 2d, Property § 11.

Footnote 23. *Beverly Beach Properties, Inc. v Nelson* (Fla) 68 So 2d 604, 41 ALR2d 1071, cert den 348 US 816, 99 L Ed 643, 75 S Ct 27.

Footnote 24. *Hanson v Denckla*, 357 US 235, 2 L Ed 2d 1283, 78 S Ct 1228, reh den 358 US 858, 3 L Ed 2d 92, 79 S Ct 10.

Footnote 25. *Texas v New Jersey*, 379 US 674, 13 L Ed 2d 596, 85 S Ct 626, supp op 380 US 518, 14 L Ed 2d 49, 85 S Ct 1136 and motion den 381 US 931, 14 L Ed 2d 698, 85 S Ct 1762 and motion den 381 US 948, 14 L Ed 2d 723, 85 S Ct 1795.

As to conflict of laws principles governing intangibles, see 16 Am Jur 2d, Conflict of Laws § 48.

## **2. "Minimum Contacts" Sufficient for Acquisition of Jurisdiction over Nonresidents [106-109]**

---

### **§ 106 Generally**

[View Entire Section](#)  
[Go to Parallel Reference Table](#)  
[Go to Supplement](#)

The "minimum contacts" test allows a state court to acquire personal jurisdiction over a nonresident defendant, 26 even though the nonresident is not personally served with process within the state. 27 The doctrine applies to acquisition of jurisdiction over individuals as well as over corporations. 28

Under the "minimum contacts" test, even if there was no service of process on the defendant in the state where the action is pending, 29 the forum state may exercise jurisdiction over a nonresident defendant, without violating due process guarantees, if the defendant has had certain minimum contacts with the forum state, such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. 30 These contacts can exist when the defendant was doing business within the state, 31 when the defendant committed a tort within the state, 32 or when he or she owned or otherwise dealt with real estate in the forum state. 33 Although the application of the "minimum contacts test" will vary with the quality and nature of the defendant's activity in the state to which the court belongs, 34 there must be some act by which the defendant purposefully avails himself or herself of the privilege of conducting activities within the forum state, thus invoking the benefit and protection of its laws, before the forum state acquires personal jurisdiction. 35

---

### **§ 106 ----Generally [SUPPLEMENT]**

**Practice Aids:** Related contacts and personal jurisdiction: The "but for" test, 82 Cal LR 6:1545-1594 (1995).

Connecting defendant's contact and plaintiff's claim: The doctrine of specific jurisdiction and the matrimonial domicile provisions of the Georgia long-arm statute, 11 Ga St U LR 2:303 (1995).

Extending the reach of the long-arm statute through the Internet, 13 J Marshall J Comput & Info L 3:433 (1995).

Execution, outside of forum, of guaranty of obligations under contract to be performed within forum state as conferring jurisdiction over non-resident guarantors under "long-arm" statute or rule of forum 28 ALR5th 664.

### **Case authorities:**

Exercise of personal jurisdiction in Texas in copyright declaratory action over defendant copyright owner offended due process where defendant's efforts to distribute his songs and his demand letter to plaintiff who owned allegedly infringing work were insufficient to satisfy minimum contact requirement since action did not arise from defendant's contacts with Texas but depended solely upon whether infringement occurred. *Ham v La Cienega Music Co.* (1993, CA5 Tex) 4 F3d 413.

Florida corporation which was engaged in ongoing contractual relationship with Tennessee business for purchase and distribution of air conditioning product manufactured in Tennessee and shipped to Florida had sufficient minimum contacts with Tennessee under Tennessee long-arm statute for exercise of personal jurisdiction, since corporation purposefully availed itself of privilege of acting in forum state, the cause of action arose from its activities there and there was sufficient connection with forum state to make exercise of jurisdiction reasonable. *Inter-City Prods. Corp v Willey* (1993, MD Tenn) 149 FRD 563.

Four doctors in Sweden who allegedly defamed California corporation in articles published in international medical journals did not have sufficient contacts with forum state for exercise of personal jurisdiction where physicians were citizen of foreign country and lacked connections to United States so that their purposeful interjection into California was very limited. *Core-Vent Corp. v Nobel Indus. AB* (1993, CA9 Cal) 11 F3d 1482, 93 CDOS 9283, 93 Daily Journal DAR 15951.

Exercise of specific in personam jurisdiction under Georgia long-arm statute over owner and manager of vessel in action brought by buyer and seller of steel wire rods under Carriage of Goods by Sea Act violated due process where vessel sank before reaching Georgia port, none of parties were Georgia residents, contract was executed and negotiated outside Georgia and contract was isolated contact with Georgia and not part of regular practice of delivering goods to Georgia. *Francosteel Corp. v M/V Charm* (1994, CA11 Ga) 19 F3d 624, 8 FLW Fed C 120.

Ohio federal court had personal jurisdiction in declaratory judgment action filed by patent infringer seeking determination of noninfringement of out-of-state patentee's patent, where patentee addressed warning letters to Ohio infringer and entered into

licensing agreement with infringer's competitor in Ohio, since patentee purposefully directed its activities regarding patent to Ohio residents. *Akro Corp. v Luker* (1995, CA FC) 45 F3d 1541, 33 USPQ2d 1505.

For a trial court to have specific jurisdiction over a defendant, the cause of action must arise out of or relate to the defendant's contact with the forum state, but, on the other hand, so long as the defendant has had continuous and systematic contacts with the forum state, a trial court has general jurisdiction even if the cause of action did not arise from the defendant's purposeful conduct in the state. *National Indus. Sand Ass'n v Gibson* (1995, Tex) 897 SW2d 769.

Due process was not violated by district court's exercise of personal jurisdiction to enforce subpoena duces tecum against former president of Bahamian companies since he had sufficient minimum contacts with United States based on his trading activities, on behalf of companies, directed toward United States and concerning matters relating to subpoena. *SEC v Knowles* (1996, CA10 Colo) 87 F3d 413.

---

## Footnotes

Footnote 26. 62B Am Jur 2d, Process § 186.

Footnote 27. 62B Am Jur 2d, Process § 175.

As to service of process out of state under long-arm statutes generally, see 62B Am Jur 2d, Process §§ 175 et seq.

Footnote 28. 62B Am Jur 2d, Process § 186.

As to minimum contacts with nonresident corporations, see 36 Am Jur 2d, Foreign Corporations § 472.

Footnote 29. 62B Am Jur 2d, Process § 175.

Footnote 30. 62B Am Jur 2d, Process § 186.

Footnote 31. § 107.

Footnote 32. § 108.

Footnote 33. § 109.

Footnote 34. *Norfolk S. Ry. v Maynard*, 190 W Va 113, 437 SE2d 277 (determination of personal jurisdiction stands or falls on each case's unique facts and precludes use of mechanical tests and talismanic jurisdictional formulas).

**Annotation:** Comment note.—"Minimum contacts" requirement of Fourteenth Amendment's due process clause (*Rule of International Shoe Co. v Washington*) for state court's assertion of jurisdiction over nonresident defendant, 62 L Ed 2d 853.

**Practice References** Process considerations in selection of forum. 3 Am Jur Trials

Footnote 35. *Hanson v Denckla*, 357 US 235, 2 L Ed 2d 1283, 78 S Ct 1228, reh den 358 US 858, 3 L Ed 2d 92, 79 S Ct 10.

A court must use a two step approach when analyzing whether personal jurisdiction exists over a foreign corporation or other nonresident. The first step involves determining whether the defendant's actions satisfy the forum state's personal jurisdiction statutes. The second step involves determining whether the defendant's contacts with the forum state satisfy federal due process. *Abbott v Owens-Corning Fiberglas Corp.*, 191 W Va 198, 444 SE2d 285, CCH Prod Liab Rep ¶ 13905.

As to the minimum contacts test generally, see 62B Am Jur 2d, Process §§ 186 et seq.

---

## § 107 Doing business in forum state

[View Entire Section](#)  
[Go to Parallel Reference Table](#)  
[Go to Supplement](#)

State long-arm statutes may require that a nonresident be "doing business" in the forum state in order for substituted or constructive service of process upon such nonresident to be considered effective and valid. 36 An individual's contract with an out-of-state party cannot alone automatically establish sufficient minimum contacts in the other party's home forum for the purpose of assertion of in personam jurisdiction. In determining whether the defendant has purposely established minimum contacts within the forum, prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing, must be evaluated. 37 Thus, when a nonresident defendant carries on regular business transactions with forum state residents, 38 substantially performs contracts in the forum state, 39 negotiates contracts in the forum state, 40 or delivers contracts in the forum state, 41 the forum state acquires jurisdiction over her in a suit for breach of contract.

Other actions considered in the business contacts analysis are telephone calls or facsimile transmissions by the defendant to the forum state, 42 substantial economic gain by the defendant from forum state transactions, 43 and payments or credit received through a forum state bank. 44 On the other hand, when plaintiff's claims do not arise from any business conducted by the defendant in the forum state, 45 or when the business contacts of the defendant with the forum state are otherwise insufficient, 46 personal jurisdiction cannot be invoked. 47

---

## § 107 ----Doing business in forum state [SUPPLEMENT]

**Practice Aids:** Stream-of-commerce theory of personal jurisdiction, 213 New York LJ 35:1 (1995).

Execution, outside of forum, of guaranty of obligations under contract to be performed

within forum state as conferring jurisdiction over non-resident guarantors under "long-arm" statute or rule of forum 28 ALR5th 664.

### **Case authorities:**

Nondomiciliary financier who had acquired interest in plaintiff's proceeds in underlying litigation for breach of contract concerning hotel ownership in Puerto Rico was subject to specific in personam jurisdiction of Puerto Rico federal district court in action brought by defendant against plaintiff's financiers, where Puerto Rico long arm statute reached instant dispute and exercise of jurisdiction was neither unreasonable nor fundamentally unfair. *Pritzker v Yari* (1994, CA1 Puerto Rico) 42 F3d 53.

By dispatching representative to Massachusetts for commercial advantage pursuant to written contract with Massachusetts firm, Canadian company transacted business in Massachusetts to such extent and in such manner as to satisfy minimum contacts requirement for exercise of personal jurisdiction over company in diversity action for breach of confidential agreement and unfair competition. *Foster- Miller, Inc. v Babcock & Wilcox Can.* (1995, CA1 Mass) 46 F3d 138.

Federal court in seller's state did not have specific personal jurisdiction over buyer in suit involving supply agreement between parties where seller solicited supply agreement in buyer's state, agreement was negotiated and executed there, and no product ever passed through seller's state, even though buyer made some telephone calls to seller in seller's state, since buyer failed to purposefully avail itself of privilege of doing business in seller's state. *Vetrotex Certaineed Corp. v Consolidated Fiber Glass Prods. Co.* (1996, CA3 Pa) 75 F3d 147.

Maryland courts may not exercise personal jurisdiction over New York private investigation firm in action by Maryland resident for violation of federal Fair Credit Reporting Act where firm's only connection with Maryland was its occasional retention by telephone of Maryland investigation companies to provide it with information about Maryland subjects including plaintiff. *Stover v O'Connell Assocs.* (1996, CA4 Md) 84 F3d 132.

Exercise of personal jurisdiction in Texas over Minnesota manufacturer of component parts in third party complaint by Delaware systems manufacturer for contribution or indemnity in action brought by Texas gas-turbine systems buyer against systems manufacturer for breach of contract, breach of warranty and strict products liability comported with due process since parts manufacturer intentionally placed its products into stream of commerce and it was not unfair to require manufacturer of goods that are knowingly delivered to specific state to respond in law suit arising out of defects in goods in that state. *Ruston Gas Turbines v Donaldson Co.* (1993, CA5 Tex) 9 F3d 415.

Illinois patent attorneys had sufficient minimum contacts with Texas to permit exercise of personal jurisdiction by federal court in diversity action brought by Texas corporation for breach of fiduciary duty and negligence through voluntary continuation of legal representation of Texas corporation over eight years, since attorneys should have anticipated possibility of being haled into court in Texas for claims arising out of that relationship. *Trinity Indus. v Myers & Assocs.* (1995, CA5 Tex) 41 F3d 229.

Michigan court lacked personal jurisdiction under Michigan long-arm statute over

out-of-state corporation which allegedly tortiously interfered with existing contract where only evidence that corporation did business in state were two letters written to individuals in Michigan since letters did not establish that defendants purposefully availed themselves of privilege of doing business in Michigan and cause of action did not arise from these letters. *Frederick v Hydro-Aluminum S.A.* (1994, ED Mich) 153 FRD 120.

Colorado corporation had substantial connection with Ohio for purposes of exercise of long- arm jurisdiction to satisfy "purposeful available" requirement in employee's suit for breach of contract and defamation where Colorado corporation contracted to sell its software in Ohio, sent employee to Ohio on at least 12 occasions to service software and stationed him in Ohio for his last two months of employment. *Farr v Spatial Technology* (1993, SD Ohio) 152 FRD 113.

Illinois Federal District Court's exercise of personal jurisdiction over foreign corporation in action brought against it for malicious abuse of process in another jurisdiction did not violate due process since corporation was "doing business" in Illinois and by employing independent sales representative there regularly had minimum contact with forum state. *Michael J. Neuman & Assocs. v Florabelle Flowers, Inc.* (1994, CA7 Ill) 15 F3d 721, reh, en banc, den *Michael J. Neuman & Assocs. v Florabelle Flowers, Inc.* (1994, CA7 Ill) 1994 US App LEXIS 5141.

Tribal court had personal jurisdiction over defendant who lived on reservation but was not tribal member in action arising out of motor vehicle accident on reservation, since defendant purposefully availed herself of privilege of conducting activities in forum, thus having minimum contacts, and tribe had special interest in exercising jurisdiction over tortious wrongdoer. *Hinshaw v Mahler* (1994, CA9 Mont) 42 F3d 1178, 94 CDOS 8920, 94 Daily Journal DAR 16618.

California long-arm statute did not confer personal jurisdiction over Kentucky bank in action by California subcontractor based on bank's breach of duty to investigate Miller Act surety applicant, where bank's sole contact with California was through its agent which signed certificate of sufficiency, since bank did not purposely avail itself of privilege of conducting activities in California. *Terracom v Valley Nat'l Bank* (1995, CA9 Cal) 49 F3d 555, 95 CDOS 1716, 95 Daily Journal DAR 3036.

Exercise in California of personal jurisdiction over foreign bank which violated California court's temporary restraining order freezing its assets in trademark counterfeiting litigation violated due process, where bank merely followed law of its own country, had no physical presence in California, and did not transact any banking business in United States, since bank did not purposefully direct its activities towards United States and would face great burden in litigating there. *Reebok Int'l v McLaughlin* (1995, CA9 Cal) 49 F3d 1387, 95 CDOS 1672.

Due process was not offended by subjecting Delaware corporation to personal jurisdiction in Alabama in suit by Alabama resident who was hired to work at Florida construction site for wrongful termination of his employment contract, where corporation was qualified to do business in Alabama, registered an agent there, and conducted construction business there, since there were sufficient contacts between state and corporation. *Johnston v Foster-Wheeler Constructors* (1994, MD Ala) 158 FRD 496.

Subjecting Italian owner of patent to personal jurisdiction in California in California competitor's declaratory judgment action alleging noninfringement and invalidity of

patent did not violate due process clause where patent owner placed its products into stream of commerce in United States through marketing agreement and knowingly and intentionally exploited California market through its distributor's advertising in California and establishing channels for providing regular advice since patent owner had sufficient minimum contacts with forum. *Viam Corp. v Iowa Export-Import Trading Co.* (1996, CA FC) 84 F3d 424.

Exercise of personal jurisdiction by Minnesota over Singapore cellular telephone seller in suit by buyer's customer was not consistent with due process where negotiations, meetings, production and delivery were all centered in Singapore, since seller did not have sufficient "minimum contacts" with Minnesota. *Digi-Tel Holdings v Proteq Telcoms.* (1996, CA8 Minn) 89 F3d 519.

Exercise of personal jurisdiction over nonresident subscriber to computer network service in Ohio which was service's home state was consistent with due process in action seeking declaratory judgment that service did not infringe subscriber's trademarks where subscriber purposefully availed himself of benefits of doing business in Ohio and action arose from subscriber's contacts with Ohio. *CompuServe, Inc. v Patterson* (1996, CA6 Ohio) 89 F3d 1257, 24 Media L R 2100, 39 USPQ2d 1502.

---

## Footnotes

Footnote 36. 62B Am Jur 2d, Process § 178.

As to long-arm statutes concerning breach of contract, see 62B Am Jur 2d, Process § 184.

As to the minimum contacts required of a liability insurance business, see 62B Am Jur 2d, Process § 195.

On doing business in state as prerequisite to jurisdiction over foreign corporation, see 36 Am Jur 2d, Foreign Corporations § 473.

Footnote 37. *Burger King Corp. v Rudzewicz*, 471 US 462, 85 L Ed 2d 528, 105 S Ct 2174.

**Annotation:** Construction and application of state statutes or rules of court predicated in personam jurisdiction over nonresidents or foreign corporations on making or performing a contract within the state, 23 ALR3d 551.

Validity, as a matter of due process, of state statutes or rules of court conferring in personam jurisdiction over nonresidents or foreign corporations on the basis of isolated business transaction within state, 20 ALR3d 1201.

Footnote 38. *Davis v Grace*, 4 Kan App 2d 704, 610 P2d 1140.

A Nebraska court had personal jurisdiction over a nonresident insurance agent in a suit brought by a resident insurer based on the fact that all business transactions between the insurer and the agent were conducted through the insurer's Nebraska home office. *Woodmen of the World Life Ins. Soc'y v Walker*, 1 Neb App 882, 510 NW2d 439, 1993



Neb App LEXIS 286.

Footnote 39. Davis v Grace, 4 Kan App 2d 704, 610 P2d 1140.

Footnote 40. Parker v Williams & Madjanik, Inc., 270 SC 570, 243 SE2d 451, appeal after remand 275 SC 65, 267 SE2d 524 (building design); State v Advance Marketing Consultants, Inc., 66 Wis 2d 706, 225 NW2d 887 (fraudulent advertising).

Defendant's traveling to Colorado from Connecticut in order to execute agreement regarding retirement of debt owed to plaintiff by corporation of which defendant was president was sufficient to allow exercise of in personam jurisdiction. Mr. Steak, Inc. v District Court for Second Judicial Dist., 194 Colo 519, 574 P2d 95.

Indiana had personal jurisdiction over non-residents in claim arising out of limited partnership investment, when non-residents discussed, solicited, negotiated, offered, and made agreements about investment by telephone and mail to Indiana, and non-residents discussed and negotiated investment in person in Indiana at least twice. Freemon v Somma (Ind App) 611 NE2d 684, transfer den (Aug 30, 1993).

Footnote 41. Davis v Grace, 4 Kan App 2d 704, 610 P2d 1140 (cattle); Hebron Brick Co. v Robinson Brick & Tile Co. (ND) 234 NW2d 250 (bricks).

Footnote 42. Waterval v District Court of El Paso County (Colo) 620 P2d 5, cert den 452 US 960, 69 L Ed 2d 971, 101 S Ct 3108; Woodmar Coin Center, Inc. v Owen (Ind App) 447 NE2d 618 (criticized on other grounds by Tandy Computer Leasing v Milam (Ind App) 555 NE2d 174); Environmental Ventures v Alda Servs. Corp., 19 Kan App 2d 292, 868 P2d 540; Hebron Brick Co. v Robinson Brick & Tile Co. (ND) 234 NW2d 250.

Footnote 43. Davis v Grace, 4 Kan App 2d 704, 610 P2d 1140.

Footnote 44. Davis v Grace, 4 Kan App 2d 704, 610 P2d 1140; Marquette Nat'l Bank v Norris (Minn) 270 NW2d 290.

Defendant had sufficient contacts with state to support in personam jurisdiction when loan was made to defendant from state bank and when note came due, interest was paid and renewal note was accepted by bank, notwithstanding fact that renewal note was executed outside state. Rosedale State Bank & Trust Co. v Stringer, 2 Kan App 2d 331, 579 P2d 158, 24 UCCRS 660.

Footnote 45. Andrews University v Robert Bell Industries, Ltd. (WD Mich) 685 F Supp 1015 (applying Michigan law).

In action by construction worker against his employer, jurisdiction could not be asserted with respect to co-employee when his only contact with state occurred when he was in Iowa on business for parent corporation which was unrelated to construction activity. Barrett v Bryant (Iowa) 290 NW2d 917.

Footnote 46. Andrews University v Robert Bell Industries, Ltd. (WD Mich) 685 F Supp 1015 (three product sales in forum state in 11 year period was not "continuous and systematic" part of defendant's general business).

When defendant advertised truck for sale in Portland newspaper and truck was tendered

and accepted in Oregon by resident of Idaho, defendant's minimum contacts with Idaho, namely, a phone call from plaintiff inquiring about truck, use of Idaho bank as agent for transfer of title, and attempts to repossess the truck in Idaho, were not sufficient to support personal jurisdiction of defendant in Idaho. *Akichika v Kellerher*, 96 Idaho 930, 539 P2d 283.

Insufficient contacts existed when bank advertised its services through television station located in forum, but ceased advertising some 4 months prior to date cause of action arose; bank had customers who were residents of forum; telephone directory in which bank was listed was distributed in forum; and bank administered trust that owned property located in forum. *Roger Williams Gen. Hosp. v Fall River Trust Co.* (RI) 423 A2d 1384.

Footnote 47. As to the application of the minimum contacts test generally, see 62B Am Jur 2d, Process § 187.

---

## § 108 Tortious act in forum state

[View Entire Section](#)  
[Go to Parallel Reference Table](#)  
[Go to Supplement](#)

A state can acquire jurisdiction over a nonresident defendant when that defendant has had certain minimum tortious contacts in the forum state, 48 including such conduct as defamation 49 and defective design. 50 Under the effects plus minimum contacts test, a state can acquire personal jurisdiction over a nonresident individual who causes effects in the state by a tortious act done elsewhere. 51 However, when the nonresident's contacts with the forum state are tenuous, personal jurisdiction is lacking. 52

---

## § 108 ----Tortious act in forum state [SUPPLEMENT]

### Case authorities:

Connecticut long arm statute did not confer personal jurisdiction over Texas hospital in tort action brought by patients against hospital and manufacturer of surgical implants for injuries caused by defective implants, where hospital was not part of joint venture with manufacturer over which Connecticut had jurisdiction. *Bensmiller v E.I. Dupont De Nemours & Co.* (1995, CA2 Conn) 47 F3d 79.

---

### Footnotes

Footnote 48. On commission of tort in state as subjecting foreign corporation to jurisdiction, see 36 Am Jur 2d, Foreign Corporations § 367.

As to long-arm jurisdiction over nonresident motorists, see 62B Am Jur 2d, Process § 181.

As to long-arm statutes governing products liability, see 62B Am Jur 2d, Process § 183.

As to long-arm jurisdiction generally, see 62B Am Jur 2d, Process §§ 175 et seq.

Footnote 49. *Cole v Doe*, 77 Mich App 138, 258 NW2d 165.

Due process clause supports exercise by state of personal jurisdiction over foreign journalist who entered state to conduct investigative reporting on real estate venture, and who, during such activity, allegedly slandered corporation doing business in state. *American Land Program, Inc. v Bonaventura Uitgevers Maatschappij, N.V.* (CA10 Utah) 710 F2d 1449, 9 Media L R 1874.

As to the effects plus minimum contacts test in libel cases, see 62B Am Jur 2d, Process § 194.

**Annotation:** In personam jurisdiction, in libel and slander action, over nonresident who mailed allegedly defamatory letter from outside state, 83 ALR4th 1006.

Footnote 50. *Parker v Williams & Madjanik, Inc.*, 270 SC 570, 243 SE2d 451, appeal after remand 275 SC 65, 267 SE2d 524.

Footnote 51. 62B Am Jur 2d, Process § 193.

Footnote 52. *Kilcrease v Butler*, 293 Ark 454, 739 SW2d 139 (mailing of medical report across state lines); *Shellenberger v Tanner*, 138 Ga App 399, 227 SE2d 266, appeal after remand 146 Ga App 110, 245 SE2d 463 (owning and repairing defective airplane later sold to forum state resident); *Kailieha v Hayes*, 56 Hawaii 306, 536 P2d 568 (treating medical patient who later caused accident out of state); *Jahner v Jacob* (ND) 252 NW2d 1, related proceeding (ND) 515 NW2d 183 (receiving fraudulent interstate transfer with no prior knowledge); *Amundson v Jackson*, 122 Or App 85, 857 P2d 155, reconsideration den (Oct 13, 1993) and review den 318 Or 458, 871 P2d 122 (selling collector cars in California to Oregon buyer).

**Annotation:** Products liability: personal jurisdiction over nonresident manufacturer of component incorporated in another product, 69 ALR4th 14.

Forum state's jurisdiction over nonresident defendant in action based on obscene or threatening telephone call from out of state, 37 ALR4th 852.

Doctrine of forum non conveniens: assumption or denial of jurisdiction in action between nonresident individuals based upon tort occurring within forum state, 92 ALR3d 797.

State's power to subject nonresident individual other than a motorist to jurisdiction of its courts in action for tort committed within state, 78 ALR2d 397.

Power of state to subject foreign corporation to jurisdiction of its courts on sole ground that corporation committed tort within state, 25 ALR2d 1202.

---

## § 109 Ownership, use, possession or sale of real property in forum state

[View Entire Section](#)  
[Go to Parallel Reference Table](#)  
[Go to Supplement](#)

A state can acquire jurisdiction over a nonresident defendant when that defendant has had certain minimum contacts concerning realty located in the forum state, such as offers to purchase real property, 53 negotiations relating to the sale of real property, 54 financing the purchase of real property, 55 inspection and survey of real property, 56 closing transactions for the sale of real property, 57 and use and possession of real property in the forum state. 58

---

## § 109 ----Ownership, use, possession or sale of real property in forum state [SUPPLEMENT]

### Case authorities:

Contacts with Utah of out-of- state lessor of real property containing geothermal resources were insufficient for due process purposes to render him subject to personal jurisdiction in Utah in action brought by Utah resident against him for tortious interference with contractual relationships, where contacts surrounding alleged torts, solicitation, and telecommunications from defendants to Utah were minimal. *Far W. Capital v Towne* (1995, CA10 Utah) 46 F3d 1071.

---

### Footnotes

Footnote 53. *Cockerham v Zikratch*, 127 Ariz 230, 619 P2d 739; *Dwyer v District Court, Sixth Judicial Dist.*, 188 Colo 41, 532 P2d 725; *Cox v Long*, 143 Ga App 182, 237 SE2d 672.

Footnote 54. *Cox v Long*, 143 Ga App 182, 237 SE2d 672.

Footnote 55. *Equitable Trust Co. v O'Neill* (Del Super) 420 A2d 1196 (default in mortgage payments); *Hart v De Lowe Partners, Ltd.*, 147 Ga App 715, 250 SE2d 169, 4 ALR4th 949 (action on promissory note); *Code v Gaunce* (ND) 315 NW2d 304 (action to recover earnest money).

In action against nonresident purchasers, minimum contacts were sufficiently established when, though contract for purchase was negotiated outside of state, defendants paid 10 percent of purchase price in forum state and agreed to submit balance at closing and appeared before local city counsel to seek bond issue relative to property, thus establishing defendants as equitable owners of subject property. *Bryan Mfg. Co. v Harris* (Ind App) 459 NE2d 1199.

Footnote 56. *Dwyer v District Court, Sixth Judicial Dist.*, 188 Colo 41, 532 P2d 725; *Bryan Mfg. Co. v Harris* (Ind App) 459 NE2d 1199.

Footnote 57. Cox v Long, 143 Ga App 182, 237 SE2d 672 (preparation of documents, recording of deeds, and payments of fees).

Footnote 58. Equitable Trust Co. v O'Neill (Del Super) 420 A2d 1196.

## **F. Duration of Jurisdiction [110-112]**

### **Research References**

ALR Digest: Courts § 213

ALR Index: Jurisdiction

---

### **§ 110 Generally**

[View Entire Section](#)  
[Go to Parallel Reference Table](#)  
[Go to Supplement](#)

The jurisdiction of a court is continuing; 59 once a court has acquired jurisdiction of a case, its jurisdiction continues until the court has done all that it can do to exercise that jurisdiction, to determine, subject to appellate review, 60 all the issues involved, 61 and to grant such complete relief as is within its jurisdictional power to grant. 62 This does not mean, however, that a court which has acquired jurisdiction over a case cannot lose it in the course of the proceedings. 63

A trial court retains continuing jurisdiction after the final judgment only as allowed by the judgment itself or by statute or rule. 64 When an appeal is taken, the trial court is divested of jurisdiction 65 and jurisdiction is transferred to the appellate court. 66

---

### **§ 110 ----Generally [SUPPLEMENT]**

**Practice Aids:** When does federal court become divested of jurisdiction over in rem proceeding— Supreme Court cases 121 L ED 2nd 775.

---

### **Footnotes**

Footnote 59. Wheeler v Wheeler, 196 Kan 697, 414 P2d 1 (superseded by statute on other grounds as stated in Wornkey v Wornkey, 12 Kan App 2d 506, 749 P2d 1045) (action involving Uniform Reciprocal Enforcement of Support Act); Matson v Matson (Minn) 310 NW2d 502, appeal after remand (Minn) 333 NW2d 862, 31 ALR4th 696 (enforcement and modification of divorce decree).

Footnote 60. Walker v McNutt, 165 Kan 533, 196 P2d 163.

Footnote 61. Miller v Miller, 153 Neb 890, 46 NW2d 618; Bryan v Miller, 73 ND 487,

16 NW2d 275.

Footnote 62. State ex rel. Clark v Rice, 113 Ind App 238, 47 NE2d 849; Maryville v Waters, 207 Tenn 213, 338 SW2d 608.

Once a court acquires jurisdiction over parties, the jurisdiction continues until the final disposition of the litigation, including the enforcement of the judgment or decree. State ex rel. Brubaker v Pritchard, 236 Ind 222, 138 NE2d 233, 60 ALR2d 1239.

Footnote 63. Marlar v Howard, 312 Ky 209, 226 SW2d 755.

As to loss of jurisdiction, see § 112.

Footnote 64. Carter v Allen (Ind App) 631 NE2d 503.

Footnote 65. Hermes v Markham, 78 ND 268, 49 NW2d 238, remanded (ND) 60 NW2d 267.

Footnote 66. Bryan v Miller, 73 ND 487, 16 NW2d 275.

As to jurisdiction of state appellate courts generally, see 4 Am Jur 2d, Appellate Review §§ 77 et seq.

---

## § 111 Effect of events subsequent to acquisition of jurisdiction

[View Entire Section](#)  
[Go to Parallel Reference Table](#)  
[Go to Supplement](#)

Ordinarily, a court that has acquired jurisdiction of a case cannot be deprived of jurisdiction by subsequent events in the course of its proceedings, <sup>67</sup> even if those subsequent events would have prevented jurisdiction from attaching in the first place. <sup>68</sup> Thus, once the court has acquired jurisdiction, that jurisdiction continues despite the removal of the defendant, in an action in personam, or of the res, in an action in rem, beyond the territorial limits of the court's jurisdiction, <sup>69</sup> and despite the substitution of a successor for one of the defendants. <sup>70</sup>

---

## § 111 ----Effect of events subsequent to acquisition of jurisdiction [SUPPLEMENT]

**Practice Aids:** When does federal court become divested of jurisdiction over in rem proceeding— Supreme Court cases 121 L ED 2nd 775.

---

### Footnotes

Footnote 67. Resolution Trust Corp. v Foust (App) 177 Ariz 507, 869 P2d 183, 134 Ariz Adv Rep 21; Collins v Robbins, 147 Me 163, 84 A2d 536; Foster v Nordman, 244 SC

485, 137 SE2d 600.

A lengthy delay between the trial and the judgment does not divest the trial court of jurisdiction to render a decision. *Uptime Corp. v Colorado Research Corp.*, 161 Colo 87, 420 P2d 232.

Footnote 68. *Collins v Robbins*, 147 Me 163, 84 A2d 536.

Footnote 69. *Boardman v Boardman*, 135 Conn 124, 62 A2d 521, 13 ALR2d 295; *Union Chemical & Materials Corp. v Cannon* (Sup) 38 Del Ch 203, 148 A2d 348; *Marlar v Howard*, 312 Ky 209, 226 SW2d 755; *State ex rel. New York, C. & S. L. R. Co. v Norton*, 331 Mo 764, 55 SW2d 272, 85 ALR 1345; *State ex rel. Walling v Sullivan*, 245 Wis 180, 13 NW2d 550, 154 ALR 841.

As to territorial limits on the jurisdiction of a court, see § 115.

As to the effect on jurisdiction of a change of domicil in a divorce action, see 24 Am Jur 2d, Divorce and Separation § 279.

As to the effect of the removal of a child from the jurisdiction in a divorce action, see 24 Am Jur 2d, Divorce and Separation § 966.

Footnote 70. *FDIC v Warmann* (Mo App) 859 SW2d 948 (when bank enters into receivership with FDIC, federal courts do not divest state court system of jurisdiction to hear claims which were filed in state court before receivership); *Edwards v Washington Mut. Sav. Bank*, 74 Wash App 482, 875 P2d 643, reconsideration den (Wash App) 1995 Wash App LEXIS 262 (once state court has jurisdiction over claim and parties, it cannot be ousted by substitution of RTC for financial institution).

---

## § 112 Loss of jurisdiction

[View Entire Section](#)  
[Go to Parallel Reference Table](#)  
[Go to Supplement](#)

A court that has jurisdiction of a case may lose it by operation of a statute abolishing the jurisdiction of the court if the statute expressly provides, or is construed to the effect, that it is intended to affect actions pending before its enactment; <sup>71</sup> Such a construction can be given when the statute has no saving clause excluding its operation on suits pending at the time of its enactment. <sup>72</sup>

Apart from the possibility of retroactive change of a jurisdictional statute, there are various situations in which a court that has acquired jurisdiction over a case can lose its jurisdiction. For instance, when jurisdiction is based on the residence of some of the defendants within a certain district, the court loses its jurisdiction to proceed further if, because of dismissal of the suit as to all of the resident defendants, there remains only a nonresident defendant. <sup>73</sup> If the judge of the court is disqualified from hearing the case, the jurisdiction of the court with regard to discretionary matters ceases. <sup>74</sup> Also, a valid

transfer of a case from one court to another deprives the first court of jurisdiction of the case. 75 Finally, in a jurisdiction where an arbitration agreement is considered valid and enforceable, an arbitration agreement entered into after a court has acquired jurisdiction of the subject matter will ordinarily withdraw from the jurisdiction of that court the authority to deal with the merits of the proceeding. 76

---

## **§ 112 ----Loss of jurisdiction [SUPPLEMENT]**

**Practice Aids:** When does federal court become divested of jurisdiction over in rem proceeding— Supreme Court cases 121 L ED 2nd 775.

---

### **Footnotes**

Footnote 71. Ft. Smith Gas Co. v Kincannon, 202 Ark 216, 150 SW2d 968.

Footnote 72. Ft. Smith Gas Co. v Kincannon, 202 Ark 216, 150 SW2d 968.

Footnote 73. State v Younger, 206 La 1037, 20 So 2d 305.

Footnote 74. 46 Am Jur 2d, Judges § 230.

Footnote 75. Department of Social Servs. v Moran (La App 5th Cir) 638 So 2d 264.

As to effect of change of venue on jurisdiction, see 77 Am Jur 2d, Venue §§ 90, 91.

Footnote 76. 5 Am Jur 2d, Arbitration and Award § 32.

## **G. Limitations of Jurisdiction [113-129]**

### **Research References**

ALR Digest: Courts §§ 242-245

ALR Index: Amount in Controversy; Jurisdiction

7B Am Jur Pleading and Practice Forms, Courts §§ 1 et seq.

### **1. In General [113-115]**

---

## **§ 113 Generally**

|  |
|--|
| <p><a href="#">View Entire Section</a><br/><a href="#">Go to Parallel Reference Table</a><br/><a href="#">Go to Supplement</a></p> |
|--|

The distinction between general jurisdiction and limited jurisdiction is relative, since so-called "general jurisdiction" is not absolutely unlimited. 77 In fact, the jurisdiction of



no court is absolutely unlimited. 78 The scope and limitations of the jurisdiction of a court are determined by the provisions of the constitution or legislation creating it or otherwise controlling its jurisdiction. 79 No court can have powers that are not inherent in the sovereignty to which it owes its existence or under the authority of which it functions. 80 The jurisdiction of every court is limited by the principle of immunity of sovereign powers and their diplomatic representatives, 81 and by the rules determining the territorial limits of its jurisdiction. 82 Also, the jurisdiction of some courts is limited by the amount or value in controversy. 83

---

## **§ 113 ----Generally [SUPPLEMENT]**

### **Case authorities:**

The trial court erred in concluding that it lacked subject matter jurisdiction over defendant's counterclaims for taking, inverse condemnation, and violation of 42 USCS § 183 because defendant did not administratively appeal the denial of the special use permit by writ of certiorari to superior court, since review by writ of certiorari under G.S. § 153A-340 does not encompass the adjudication of issues of the type raised in the counterclaim, but the superior court did have jurisdiction in an original action to entertain the counterclaims asserted by defendant. *Guilford County Dep't of Emergency Servs. v Seaboard Chem. Corp.* (1994) 114 NC App 1, 441 SE2d 177.

---

### **Footnotes**

Footnote 77. § 68.

Footnote 78. *Cournand v Lucor Corp.* (Fla App D2) 114 So 2d 733 (every court is bound to take notice of the limits of its jurisdiction).

Footnote 79. § 58.

Footnote 80. *Brown v Fletcher's Estate*, 210 US 82, 52 L Ed 966, 28 S Ct 702; *Kase v Kase*, 18 NJ Super 12, 86 A2d 587.

The legislature of a state cannot confer on the courts of that state a power which is not within the power of the state to confer on the legislature. *Jennings v Jennings*, 251 Ala 73, 36 So 2d 236, 3 ALR2d 662.

Footnote 81. § 114.

Footnote 82. § 115.

Footnote 83. §§ 117 et seq.

---

## **§ 114 Sovereign immunity**

---

[View Entire Section](#)

The jurisdiction of every court is limited by the principle of sovereign immunity. 84 Since the United States is a sovereign power and immune from suit, a court cannot acquire jurisdiction over an action against the United States except when the United States consents. 85 Similarly, no suit in law or equity can be maintained against a state in its own courts or the courts of a sister state, by its own residents, residents of another state, or citizens of a foreign state, unless the state has consented or waived its immunity. 86 A foreign sovereign generally cannot be sued in its own courts or the courts of another country without its consent. 87

---

## **§ 114 ----Sovereign immunity [SUPPLEMENT]**

### **Case authorities:**

Court of appeals reviews de novo district court's conclusions of law regarding jurisdiction under FSIA. *Commercial Bank of Kuwait v Rafidain Bank* (1994, CA2 NY) 15 F3d 238, 27 FR Serv 3d 1353.

Head-of-state immunity blocks exercise of personal jurisdiction over president of Haiti even where claims are brought under Torture Victim Protection Act (28 USCS § 1350 note), where widow of political opponent assassinated—allegedly upon order of president—in Haitian jail seeks compensation in money damages for killing of her husband, because court must defer to State Department/President/Executive Branch recognition of defendant as Haitian head of state. *Lafontant v Aristide* (1994, ED NY) 844 F Supp 128.

Action by Guernsey corporation to enforce British judgment against Nicaraguan bank is dismissed, where corporation obtained default judgment in London court against bank for failure to pay debt in accordance with agreement, and bank moved to dismiss corporation's enforcement action on grounds of lack of subject-matter and personal jurisdiction, because bank is foreign state within Foreign Sovereign Immunities Act, 28 USCS §§ 1603 et seq., and bank's consent to litigate in British courts does not constitute implied waiver of sovereign immunity in U.S. courts under 29 USCS § 1605(a)(1). *Eaglet Corp. v Banco Cent. De Nicaragua* (1993, SD NY) 839 F Supp 232.

Existence of subject matter jurisdiction under FSIA is question of law; thus, court of appeals reviews district court's denial of sovereign immunity de novo. *Eckert Int'l v Government of the Sovereign Democratic Republic of Fiji* (1994, CA4 Va) 32 F3d 77.

Government of Fiji waived its sovereign immunity by implication when it agreed to choice of law provision contained in contract made with U.S. corporation, which stated that contract was to be construed and interpreted according to laws of state of Virginia. *Eckert Int'l v Government of the Sovereign Democratic Republic of Fiji* (1994, CA4 Va) 32 F3d 77.

---

### **Footnotes**

Footnote 84. *Oetjen v Central Leather Co.*, 246 US 297, 62 L Ed 726, 38 S Ct 309 (ovrld on other grounds as stated in *Callejo v Bancomer, S.A.* (CA5 Tex) 764 F2d 1101, CCH Fed Secur L Rep ¶ 92201) and (criticized on other grounds as stated in *Antolok v United States*, 277 US App DC 156, 873 F2d 369).

Footnote 85. 77 Am Jur 2d, United States § 112.

Footnote 86. 72 Am Jur 2d, States, Territories, and Dependencies § 99.

Footnote 87. 45 Am Jur 2d, International Law § 46.

As to jurisdiction over a foreign state under the Foreign Sovereign Immunities Act, see § 59.

As to the immunity of diplomatic officers, see 4 Am Jur 2d, Ambassadors and Consuls §§ 12 et seq.

---

## § 115 Territorial limitations

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

The jurisdiction of a court is subject to territorial limitations. 88 Its jurisdiction cannot extend beyond the territory belonging to the sovereignty on behalf of which it functions, 89 and its jurisdiction can be further limited, by constitutional or statutory provisions, to only a part of the territory of the sovereignty to which it belongs. 90

---

### Footnotes

Footnote 88. *Aranda v Patterson*, 146 Colo 424, 361 P2d 782.

No state may exercise direct jurisdiction and authority over persons or property outside its territory. *Schwartz v F.M.I. Properties Corp.* (Tex App Houston (14th Dist)) 714 SW2d 97, writ ref n r e (Oct 29, 1986).

A jurisdiction may determine the procedure for its courts, disposition of its disputes, and the treatment to be accorded litigation and parties only to the extent that the parties and procedures are applicable to the parties and subject matter over which the sovereign has jurisdiction. *Clark v Clark*, 11 Va App 286, 398 SE2d 82.

As to the extent of jurisdiction of courts created in territories that are not yet states, see 72 Am Jur 2d, States, Territories, and Dependencies § 159.

Footnote 89. *Fain v Nix*, 189 Ga 772, 7 SE2d 733; *Kase v Kase*, 18 NJ Super 12, 86 A2d 587; *State ex rel. Walling v Sullivan*, 245 Wis 180, 13 NW2d 550, 154 ALR 841.

Jurisdiction to hold hearings or to conduct trials beyond the borders of the state to which the court belongs cannot be validly conferred by stipulation or agreement of the parties. Knight v Younkin, 61 Idaho 612, 105 P2d 456.

Footnote 90. Tanner v Beverly Country Club, Inc., 217 La 1043, 47 So 2d 905 (in the absence of a constitutional or a constitutionally valid statutory provision for extraterritorial jurisdiction, a court created within and for a particular territory within a state is limited in its jurisdiction to such territory).

## **2. Amount in Controversy [116-129]**

### **a. In General [116-121]**

---

#### **§ 116 Generally**

[View Entire Section](#)  
[Go to Parallel Reference Table](#)  
[Go to Supplement](#)

The jurisdiction of courts, including appellate courts, 91 can be limited by constitutional or statutory provisions on the basis of the amount in controversy, or the amount in dispute, between the parties.

◆ Definition: "Amount in dispute" means the maximum amount that a successful party can be awarded by the judgment and the maximum amount that the unsuccessful party can be ordered to pay. It is the amount at risk in litigation. 92

Sometimes the court has no jurisdiction of matters when the amount involved exceeds a specified maximum. 93 In other courts the jurisdiction is restricted to matters involving a specified minimum amount or value. 94 Finally, the jurisdiction of some courts is limited both by a specified maximum amount and a specified minimum amount. 95

---

#### **§ 116 ----Generally [SUPPLEMENT]**

**Practice Aids:** The amount in controversy: Understanding the rules of aggregation, 26 Ariz St LJ 4:925-966 (1995).

---

#### **Footnotes**

Footnote 91. 4 Am Jur 2d, Appellate Review § 78.

Footnote 92. Walker v Dinh Van Thap (La App 4th Cir) 637 So 2d 1150.

Footnote 93. Walker v Dinh Van Thap (La App 4th Cir) 637 So 2d 1150; Salitan v Dashney, 219 Or 553, 347 P2d 974, 81 ALR2d 532.

Subject to limited exceptions, Utah circuit courts have jurisdiction in civil matters of law or equity when the claim is less than \$20,000. Burns Chiropractic Clinic v Allstate Ins. Co. (Utah App) 851 P2d 1209, 211 Utah Adv Rep 35.

Footnote 94. Riggs v Szymanski, 62 Mich App 610, 233 NW2d 670 (court transferred action to lower court on ground that damages in case were not likely to exceed \$10,000).

Footnote 95. Mullen v Renzleman, 31 Okla 53, 119 P 641.

As to absence of jurisdiction in regard to the amount in controversy as affecting the validity of a judgment, see 46 Am Jur 2d, Judgments § 25.

**Practice References** Forms relating to jurisdiction as affected by the value or amount in controversy. 7B Am Jur Pleading and Practice Forms, Courts §§ 1 et seq.

---

## § 117 Plaintiff's allegations as determining amount in controversy

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

As a general rule, it is the amount or value set forth in the damages clause 96 of the complaint or other initial pleading of the plaintiff which determines whether the court has jurisdiction under provisions restricting jurisdiction on the basis of the amount in controversy. 97 The existence or nonexistence of the required jurisdictional amount is determined as of the time the complaint is filed. 98 The amount or value alleged by the plaintiff is generally determinative irrespective of error on her part in making her claim, provided the error was unintentional and the claim was made in good faith. 99 However, the mere assertion in the complaint of an amount exceeding the jurisdictional minimum is not sufficient when the facts alleged do not furnish any legal basis for the claim. 1

When the amount claimed by the plaintiff in the pleading is within the jurisdiction of the court, jurisdiction is not affected by the fact that prior to bringing the suit the plaintiff reduced the amount of such claim to bring it below the maximum jurisdictional amount. 2

---

### Footnotes

Footnote 96. Salitan v Dashney, 219 Or 553, 347 P2d 974, 81 ALR2d 532.

As to pleading the damages clause generally, see 22 Am Jur 2d, Damages § 851.

Footnote 97. Johnson v Washburn, 146 Neb 335, 19 NW2d 563, 167 ALR 1238; Navarro v Martin, 22 NJ Misc 291, 38 A2d 691; Fentress v Pruden, 185 Va 461, 39 SE2d 240.

It is not a party's out-of-court belief, calculation, or statement of damages which determines the amount of relief sought. Instead, it is the party's complaint filed with the court that is dispositive on the issue. *Meyers v Langley* (Ind App) 638 NE2d 875.

Footnote 98. *Catchot v Russell*, 160 Miss 330, 134 So 140, 77 ALR 988.

Footnote 99. § 118.

Footnote 1. *Gannett v King* (Fla App D2) 108 So 2d 299 (since attorneys' fees were not recoverable as an item of damages, such fees could not be added to the amount in controversy so as to satisfy the required jurisdictional amount).

Footnote 2. *Meyers v Langley* (Ind App) 638 NE2d 875; *Fentress v Pruden*, 185 Va 461, 39 SE2d 240.

A plaintiff with unliquidated claims which are not severable can reduce those claims and make them for a sum within the court's jurisdiction. *Lucey v Southeast Texas Emergency Physicians Assoc.* (Tex App El Paso) 802 SW2d 300, writ den (Apr 10, 1991) and reh'g of writ of error overr (May 8, 1991).

---

## § 118 Effect of plaintiff's error

[View Entire Section](#)  
[Go to Parallel Reference Table](#)  
[Go to Supplement](#)

When the plaintiff makes an unintentional mistake as to the amount or value claimed, that mistake will not prevent his or her claim from determining whether the proper jurisdictional amount is involved if the claim was made in good faith. 3 Thus, if the plaintiff overstates his or her claim, as by failing to credit payments to which the defendant is entitled and which would reduce defendant's obligation below the minimum jurisdictional amount, the court can retain jurisdiction unless the plaintiff made the excessive demand in bad faith. 4 However, notwithstanding the bona fides of plaintiff's demand at the time of institution of the suit, a court is precluded as a matter of judicial power from entering a judgment for damages in excess of its mandated jurisdiction. 5

---

## § 118 ----Effect of plaintiff's error [SUPPLEMENT]

### Case authorities:

The trial court erred in denying the motion of defendant wives to dismiss for lack of personal jurisdiction since the marital interest defendant wives potentially had in their husbands' company stock was not a direct and substantial commercial interest sufficient to support the trial court's assertion of personal jurisdiction and did not demonstrate any purposeful availing of the benefits and protection of North Carolina laws. *Centura Bank v Pee Dee Express* (1995) 119 NC App 210, 458 SE2d 15.

The trial court had authority under GS § 1-75.4(4) to exercise personal jurisdiction over the nonresident defendants where plaintiff alleged that the individual defendants, as officers, directors and the alter ego of a Florida corporation, supplied a weight loss drug to defendant pharmacy in this state; the Florida corporation manufactured, marketed and distributed the drug; and plaintiff's injuries were caused by his consumption of the drug. Furthermore, the nonresident defendants had sufficient minimum contacts with this state so that the exercise of personal jurisdiction over them did not violate due process where defendants, as the alter ego of the Florida corporation, advertised the weight loss drug in the print and electronic media; the corporation sold the drug to defendant distributor, who advertised and sold the drug to defendant pharmacy in this state; and the individual defendants, through the corporation and their distributor, thus injected the drug into the stream of commerce in this state with the expectation that the drug would be purchased by consumers here. *Tart v Prescott's Pharmacies* (1995) 118 NC App 516, 456 SE2d 121.

No basis for personal jurisdiction existed under GS § 1-75.4(3), the long-arm statute pertaining to acts or omissions within this state, though defendant may have been a truck driver for a North Carolina corporation and may have failed to properly inspect the vehicle he was driving at the time of the accident, since the agency relationship was alleged in the complaint but no sworn verification appeared of record; defendant made no response to plaintiffs' allegations, including no admission; even if the court did have jurisdiction over defendant's employer, that would not give the court personal jurisdiction over defendant, as an agent may not be held liable under the jurisdiction of North Carolina courts for acts or omissions allegedly committed by the corporation; and there was no allegation or evidence that defendant's alleged failure to inspect the vehicle and his operation of the vehicle occurred within North Carolina. *Godwin v Walls* (1995) 118 NC App 341, 455 SE2d 473.

GS § 1-75.4(1) was ineffective to confer upon North Carolina courts personal jurisdiction over defendant with respect to plaintiffs' claims for wrongful death and property damage, since plaintiffs did not make a prima facie showing that defendant was engaged in substantial activity within this state when service of process was made upon him. *Godwin v Walls* (1995) 118 NC App 341, 455 SE2d 473.

The claims of plaintiffs for negligent infliction of emotional distress and loss of consortium are classified as "injuries to person or property" within the purview of GS § 1-75.4(4) conferring in personam jurisdiction for acts occurring outside North Carolina, provided service activities were carried on within North Carolina, and defendant's own affidavit showed that he picked up or delivered pharmaceuticals in North Carolina on two occasions each week; however, claims of wrongful death and property damage could not be joined in the action alleging negligent infliction of emotional distress and loss of consortium. *Godwin v Walls* (1995) 118 NC App 341, 455 SE2d 473.

The nonresident defendant had sufficient contacts with North Carolina to meet the requirements of due process and to permit the exercise of personal jurisdiction over him where defendant entered into an employment arrangement with a North Carolina based company, purposefully availed himself of the privilege of conducting business here for the purpose of obtaining a financial benefit, and traveled to this state approximately twice weekly over an eight-month period hauling pharmaceuticals for another company with offices in North Carolina. *Godwin v Walls* (1995) 118 NC App 341, 455 SE2d 473.

North Carolina had jurisdiction over the male South Carolina defendants where they

executed leases and guaranty agreements with plaintiff, a North Carolina bank; and defendants had sufficient minimum contacts with this state to allow the exercise of in personam jurisdiction where they did some business in North Carolina; some of their business was conducted by trucks travelling to and from North Carolina; some customers were located in this state or had facilities here; some of their own trucks travelled within North Carolina; and the trucks leased by defendants from plaintiff operated on North Carolina highways. *Centura Bank v Pee Dee Express* (1995) 119 NC App 210, 458 SE2d 15.

---

## Footnotes

Footnote 3. *Gannett v King* (Fla App D2) 108 So 2d 299.

Footnote 4. *Oliver v Edward Weil Co.* (Tex Civ App) 138 SW 1109 (plaintiff's omission of credit for disputed payment was consistent with good faith).

After striking a claim for punitive damages, the circuit court properly transferred the remaining claim for compensatory damages to the county court when allegations in the complaint did not in good faith support the sum demanded or actually placed in controversy. *Taylor v Lee Chevrolet, Inc.* (Fla App D1) 376 So 2d 474.

Footnote 5. *Gaer v State* (Fla) 372 So 2d 80.

---

## § 119 Effect of amendment of pleadings

|   |
|---|
| <p><a href="#">View Entire Section</a><br/><a href="#">Go to Parallel Reference Table</a></p> |
|---|

Although the amount essential for the jurisdiction of the court is to be determined as of the time the complaint is filed, 6 when an original suit is within the jurisdictional limits and a subsequent amendment to the pleadings seeks only additional damages that have accrued because of the passage of time, 7 and when there is no allegation of bad faith or fraud in invoking the jurisdiction of the court, the amendment does not defeat jurisdiction, notwithstanding the fact that it raises the amount in controversy over the maximum jurisdictional limit. 8

Prior to judgment a complaint can be amended in the trial court to give the court jurisdiction which it would not have had from the allegations of the complaint, as by an amendment reducing the amount originally claimed so as to bring it within the allowed maximum amount. 9 However, an amendment of the original complaint with regard to the amount claimed cannot be made after the trial court has rendered the judgment. Accordingly such an amendment cannot be made for the first time at the appellate stage. 10

---

## Footnotes



Footnote 6. § 117.

Footnote 7. *Mr. W. Fireworks, Inc. v Mitchell* (Tex) 622 SW2d 576, reh'g of cause overr (Nov 12, 1981) and reh'g of writ of error overr (May 26, 1982) (amendment seeking additional attorney's fees accruing due to further prosecution of suit did not divest court of jurisdiction).

Footnote 8. *Flynt v Garcia* (Tex) 587 SW2d 109.

Footnote 9. *Steingold v L & L Motors, Inc.* (Fla App D3) 207 So 2d 19.

Trial court erred in holding it lacked jurisdiction over a doctor's counterclaim when although the doctor's original counterclaim sought damages which far exceeded the jurisdictional limits of the court, his fourth amended counterclaim reduced the amounts sought and alleged after each count and in the prayer that in no event should the actual damage sum exceed the maximum jurisdictional limits of the court. *Lucey v Southeast Texas Emergency Physicians Assoc.* (Tex App El Paso) 802 SW2d 300, writ den (Apr 10, 1991) and reh'g of writ of error overr (May 8, 1991).

Footnote 10. *Stacy v Mullins*, 185 Va 837, 40 SE2d 265, 168 ALR 636.

As to amendment of damages clause generally, see 22 Am Jur 2d, Damages § 856.

---

## § 120 Effect of counterclaim

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

Although a court has no jurisdiction to adjudicate a counterclaim in excess of its jurisdictional amount, 11 and although some jurisdictions have statutes providing that if the defendant pleads a counterclaim in an amount in excess of the jurisdiction of the court in which the action is filed, the case must be transferred to a court whose jurisdiction includes the amount of the counterclaim, 12 in the absence of such a statute, the filing of a counterclaim exceeding the maximum allowed for the court's jurisdiction does not oust the court of jurisdiction of the plaintiff's claim. 13 A court that has jurisdiction of a plaintiff's action in that the amount claimed is not below the minimum jurisdictional amount is not deprived of that jurisdiction by defendant's counterclaiming for an amount below that jurisdictional minimum. 14

---

## Footnotes

Footnote 11. *Horton v White* (Miss) 254 So 2d 188.

In an action brought in county court under the state Deceptive Trade Practices Act, the judgment for the original defendants was reversed for lack of jurisdiction where, although the original plaintiff had sought recovery within the court's jurisdictional limits, the original defendants had counterclaimed for an amount in excess of such limits.

Kitchen Designs, Inc. v Wood (Tex Civ App Texarkana) 584 SW2d 305, writ ref n r e (Sep 19, 1979) and reh'g of writ of error overr (Oct 24, 1979).

As to jurisdiction over counterclaims generally, see 20 Am Jur 2d, Counterclaim, Recoupment, and Setoff § 139.

Footnote 12. Robertson v Maroevich, 42 Cal App 2d 610, 109 P2d 708; Salitan v Dashney, 219 Or 553, 347 P2d 974, 81 ALR2d 532 (but court has jurisdiction despite fact that combined amounts of claim and counterclaim exceed jurisdictional maximum amount).

Footnote 13. Auto Finance Co. v Simmons, 247 NC 724, 102 SE2d 119; Mortiz v Byerly (Tex Civ App) 185 SW2d 589, writ ref.

Footnote 14. Mortiz v Byerly (Tex Civ App) 185 SW2d 589, writ ref.

---

## § 121 Determining amount where injunctive relief is sought

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

When an execution debtor seeks an injunction to prevent a sale of the property seized in the course of the execution against him or her, and bases such demand on any other ground than exemption, the amount in execution, and not the value of the property seized, is the amount in dispute for jurisdictional purposes. 15 However, when a third person seeks an injunction on the ground that he or she, and not the execution debtor, is the owner of the property, the value of the property seized rather than the amount of the judgment being executed determines whether the court has jurisdiction to adjudicate that injunction matter. 16 The latter rule also applies when it is the execution debtor who sought an injunction on the ground that the property was exempt from execution. 17

In suits to enjoin the enforcement of statutes or ordinances imposing a property tax or a license or an excise tax or fee, the amount of the tax or fee sought to be enforced is the amount in controversy. 18

---

### Footnotes

Footnote 15. Cushing v Sambola & Ducros, 30 La Ann 426.

Footnote 16. Speyrer v Miller, 108 La 204, 32 So 524.

In determining whether a injunction suit involves an amount sufficient to give the court jurisdiction, the proper test is the value of the property or property rights which the petitioner is seeking to protect. State ex rel. Attorney Gen. v Kizer, 164 SC 383, 162 SE 444, 81 ALR 722.

Footnote 17. Speyrer v Miller, 108 La 204, 32 So 524.

Footnote 18. *Gypsy Oil Co. v Oklahoma Tax Com.*, 292 US 611, 78 L Ed 1471, 54 S Ct 779.

As to jurisdiction in injunction suits generally, see 42 Am Jur 2d, Injunctions § 249.

## **b. Propriety of Considering Particular Items of Damages [122%126]**

---

### **§ 122 Exemplary damages**

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

When the jurisdiction of a court depends on the amount in controversy, and the complaint alleges exemplary as well as actual damages, both are considered in determining whether the jurisdictional requirement as to the amount in controversy has been met, 19 provided the claim for exemplary damages is made in good faith. 20

---

#### **Footnotes**

Footnote 19. *Liera v Senatore*, 75 Wash App 97, 877 P2d 700, review den, motion den 125 Wash 2d 1022; *Warren v Monahan Beaches Jewelry Center, Inc.* (Fla App D1) 548 So 2d 870, 14 FLW 2165.

Footnote 20. *Bell v Preferred Life Assurance Soc.*, 320 US 238, 88 L Ed 15, 64 S Ct 5; *Taylor v Lee Chevrolet, Inc.* (Fla App D1) 376 So 2d 474.

---

### **§ 123 Interest**

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

When the amount claimed at the commencement of an action gives the court jurisdiction, the interest accruing on the amount claimed before the rendition of judgment does not defeat the jurisdiction of the court, even when the addition of the interest pushes the amount over the maximum jurisdictional limits of the court. 21 In the absence of a statutory provision to the contrary, the only interest considered when determining the jurisdictional amount is that which accrued before the filing of the complaint. 22

When a constitutional or statutory provision expressly excludes interest from the computation of the jurisdictional amount, 23 even interest accrued prior to the filing of the complaint is not considered. 24 When the applicable constitutional or statutory

provision makes no mention of interest, some courts, in determining the jurisdictional amount involved, include any interest that has accrued prior to the filing of the plaintiff's pleading and which has been included in his or her claim in addition to the principal amount. 25 Other courts, however, hold that interest due must be excepted from computation of the jurisdictional amount even though it is not excluded by name in the relevant constitutional or statutory provision. 26

---

### Footnotes

Footnote 21. *Johnson v Washburn*, 146 Neb 335, 19 NW2d 563, 167 ALR 1238.

Footnote 22. *Johnson v Washburn*, 146 Neb 335, 19 NW2d 563, 167 ALR 1238.

Footnote 23. *Hartford Mining Co. v Home Lumber & Coal Co.*, 61 Nev 19, 114 P2d 1093.

Footnote 24. *Humphrey v Coquillard Wagon Works*, 37 Okla 714, 132 P 899.

Footnote 25. *Salitan v Dashney*, 219 Or 553, 347 P2d 974, 81 ALR2d 532.

Footnote 26. *Gardner v Bookout*, 200 Miss 158, 26 So 2d 343.

As to pleading interest generally, see 22 Am Jur 2d, Damages § 884.

As to pleading prejudgment interest, see 22 Am Jur 2d, Damages § 886.

---

## § 124 Statutory penalty

|   |
|---|
| <p><a href="#">View Entire Section</a><br/><a href="#">Go to Parallel Reference Table</a></p> |
|---|

When an action is for a principal sum and a statutory penalty, the question arises whether the amount of the statutory penalty should be considered in the computation of the amount in litigation. In an action for damages on account of injury to property, the statutory penalty for failure to settle the claim was added to the amount of damages claimed in order to determine whether the total sum was within the jurisdiction of the court. 27 However, a mere unfounded claim to a penalty does not place the case within the jurisdiction of the court. 28

---

### Footnotes

Footnote 27. *Mobile & O. R. Co. v Greenwald & Champenois*, 104 Miss 417, 61 So 426.

Footnote 28. *Bybee v Fireman's Fund Ins. Co.*, 160 Tex 429, 331 SW2d 910, reh'g of writ of error overr (Mar 2, 1960) (where petition failed to specify statute upon which claim to penalty was based, and none of the statutes which the plaintiff might have intended to

invoke would have entitled him to such penalty, jurisdictional amount was not satisfied).

As to statutory penalties as damages, see 22 Am Jur 2d, Damages § 7.

As to statutory double or treble damages generally, see 22 Am Jur 2d, Damages §§ 813 et seq.

As to pleading double or treble damages, see 22 Am Jur 2d, Damages § 850.

---

## § 125 Sums to become due in the future

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

When the defendant's obligation to pay under a contract, assuming that he or she is liable at all, would be spread over a period of time, and the amount presently due is below the minimum jurisdictional amount, the question arises as to whether amounts to become due in the future can be taken into consideration. Depending upon the type of contract involved, the amounts due in the future can be aggregated with the amount presently due. 29 However, in cases in which the only question is the extent of the obligation of an insurer under a policy of insurance, future potential benefits cannot be taken into consideration. 30

---

### Footnotes

Footnote 29. *Davis v American Foundry Equipment Co.* (CA7 Ind) 94 F2d 441, 115 ALR 1486 (amount of whole contract, not amount due, determined amount in controversy).

As to actions on contracts to pay money in installments, see 1 Am Jur 2d, Actions § 117.

Footnote 30. *Norager v Mountain States Life Ins. Co.*, 10 Cal App 2d 188, 51 P2d 443.

As to prospective damages for breach of contract, see 22 Am Jur 2d, Damages § 675.

---

## § 126 Costs; attorneys' fees

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

Even when costs can be recovered and the complaint expressly demands costs, they cannot be considered in determining the jurisdictional amount. 31 In some jurisdictions, this rule is established by statute. 32

Some courts refuse to include attorneys' fees in the jurisdictional amount, on the ground that attorneys' fees are part of the costs of an action and thus not to be considered. 33 Of course, attorneys' fees that are not allowable cannot be considered in computing the amount in litigation for jurisdictional purposes. 34 However, when attorneys' fees are allowable, as when expressly stipulated in the agreement of the parties, and not regarded as costs, they can be considered in determining whether the jurisdictional amount is involved in the litigation. 35

When a court has jurisdiction of the total sum sought in the complaint, including attorney fees payable under a contract, the court will not lose jurisdiction if more attorney fees are incurred in litigation, causing the total amount sought to exceed jurisdictional limits. 36 Nevertheless, an award of attorney's fees cannot exceed a court's maximum jurisdictional amount. 37

---

## Footnotes

Footnote 31. *Director General of Railroads v Wilford*, 81 Fla 430, 88 So 256.

Footnote 32. *Mosher v Bellas*, 33 Ariz 147, 264 P 468; *Navarro v Martin*, 22 NJ Misc 291, 38 A2d 691.

Footnote 33. *Wade v Markham* (Mo App) 106 SW2d 939; *Stake v Western Assurance Co.*, 136 Neb 735, 287 NW 222 (ovrld in part on other grounds by *Muff v Mahloch Farms Co.*, 186 Neb 151, 181 NW2d 258).

Footnote 34. *Gannett v King* (Fla App D2) 108 So 2d 299; *Bybee v Fireman's Fund Ins. Co.*, 160 Tex 429, 331 SW2d 910, reh'g of writ of error overr (Mar 2, 1960).

Footnote 35. *PTS of Gainesville, Inc. v Olivetti Corp. of America* (Fla App D1) 334 So 2d 324; *Catchot v Russell*, 160 Miss 330, 134 So 140, 77 ALR 988.

Footnote 36. *Ferrell v Glenwood Brokers, Ltd.* (Colo) 848 P2d 936.

Footnote 37. *Bakkebo v Municipal Court for Pomona Judicial Dist.* (2nd Dist) 124 Cal App 3d 229, 177 Cal Rptr 239.

## c. Effect of Splitting or Joinder of Claims or Parties [127-129]

---

### § 127 Splitting claim

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

A plaintiff cannot split an entire or indivisible claim to give jurisdiction to a court that would not have jurisdiction of the entire claim, 38 unless the splitting operates as a

remission, as a matter of law, of that part of plaintiff's claim in excess of the amount demanded in the complaint. 39 Thus, a plaintiff cannot break an indivisible claim that exceeds the maximum amount of which a court has jurisdiction into separate amounts, each of which is within the jurisdictional limits of that court, and bring separate actions. 40

---

## Footnotes

Footnote 38. *Pic v Mente & Co.*, 201 La 237, 9 So 2d 532; *Cornelia V. V. Booraem's Estate, Inc. v Lubow*, 120 NJL 575, 1 A2d 35.

Generally, as to splitting causes of action, see 1 Am Jur 2d, Actions §§ 110 et seq.

Footnote 39. *Fentress v Pruden*, 185 Va 461, 39 SE2d 240.

Footnote 40. *Kearney v Fenerty*, 185 La 862, 171 So 57 (total amount due on installment contract became single matured obligation by virtue of acceleration agreement, and could not be split up in order to confer jurisdiction on court which did not have jurisdiction of total amount).

As to splitting a cause of action arising out of an installment contract, see 1 Am Jur 2d, Actions § 117.

---

## § 128 Joinder of claims

|   |
|---|
| <p><a href="#">View Entire Section</a><br/><a href="#">Go to Parallel Reference Table</a></p> |
|---|

When there is a proper joinder of causes of action, without a joinder of parties, the aggregate of the amounts of the joint claims, and not the amount of each individual claim, determines, for jurisdictional purposes, the amount involved in the litigation. 41 Similarly, a court cannot render a judgment in excess of its maximum limitation by awarding the maximum amount for each cause of action set forth in the complaint; the jurisdictional limit applies to the entire complaint rather than to each individual cause of action. 42

Claims are aggregated for jurisdictional purposes not only when the plaintiff originally owned all the causes of action joined in the complaint, but also when he or she acquired some of them through a bona fide transfer or assignment intended to convey full title of the causes of action. 43 However, the principle generally does not apply when the transfer or assignment was merely colorable, or was made solely for the purpose of collection by the transferee or assignee, 44 or when there is not only a joinder of claims, but also a joinder of parties. 45

---

## Footnotes

Footnote 41. *Ras v Allan Anthony Electric Corp.* (1st Dist) 55 Ill App 2d 176, 204 NE2d 797; *Hartford Mining Co. v Home Lumber & Coal Co.*, 61 Nev 19, 114 P2d 1093; *Salitan v Dashney*, 219 Or 553, 347 P2d 974, 81 ALR2d 532.

In a complaint by a single plaintiff, maximum limitation on jurisdiction of county court applied to total amount in complaint and not to each individual cause of action. *Peoples Nat'l Bank v Yodowitz*, 99 Misc 2d 978, 417 NYS2d 849.

Footnote 42. *Mandel v Kent* (2d Dept) 70 App Div 2d 903, 417 NYS2d 306.

Footnote 43. *Stokke v Graham*, 129 Mont 96, 281 P2d 1025.

Footnote 44. *Bullard v Cisco*, 290 US 179, 78 L Ed 254, 54 S Ct 177, 93 ALR 141.

Footnote 45. *Frost v Mighetto*, 22 Cal App 2d 612, 71 P2d 932.

As to joinder of causes of action, generally, see 1 Am Jur 2d, Actions §§ 81 et seq.

---

## § 129 Joinder of parties

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

When two or more plaintiffs join separate and independent claims in a single suit, 46 the amount of each separate claim must be within the jurisdictional limits of the court, and the amounts of the various claims cannot be aggregated to determine whether the court has jurisdiction. However, when the claims joined by two or more plaintiffs in a single action are common claims or are otherwise connected, the aggregate amount claimed determines whether or not the court has jurisdiction over the amount in litigation. 47

---

### Footnotes

Footnote 46. *Hammell v Superior Court of Los Angeles County*, 217 Cal 5, 17 P2d 101; *Navarro v Martin*, 22 NJ Misc 291, 38 A2d 691 (counterclaims).

The trial court had jurisdiction when the judgment awarded father \$2500 and each child \$9800, at a time when the court's jurisdiction was from \$500 to \$10,000; viewing the three parties' claims as individual claims, each came within the jurisdiction of the court. *Blake v Blake* (Tex App Houston (1st Dist)) 725 SW2d 797, appeal after remand (Tex App Houston (1st Dist)) 1990 Tex App LEXIS 585, writ den.

As to joinder of parties generally, see 59 Am Jur 2d, Parties §§ 92 et seq.

Footnote 47. *Frost v Mighetto*, 22 Cal App 2d 612, 71 P2d 932 (when husband and wife have community property interest in amount to be recovered in action for damages, their claims, arising out of same accident, are aggregated to determine whether amount is within court's jurisdiction); *State ex rel. West Palm Beach v Chillingworth*, 100 Fla 489,



---

## VIII. DOCTRINE OF FORUM NON CONVENIENS [130-146]

### A. Generally [130-133]

#### **Research References**

ALR Digest: Courts § 273.5

ALR Index: Forum Non Conveniens

8A Am Jur Pl & Pr Forms (Rev), Dismissal, Discontinuance, and Nonsuit, Forms 92, 106

3 Am Jur Trials 553, Selecting the Forum–Plaintiff's Position; 3 Am Jur Trials 611, Selecting the Forum–Defendant's Position

---

#### **§ 130 Nature of doctrine**

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

According to the doctrine of forum non conveniens, where the plaintiff has a choice of forum, 48 a court may, in the exercise of sound discretion, decline to exercise its jurisdiction over an action if it determines that the case may more conveniently, yet justly, proceed in another court before which the plaintiff may bring it after refusal of the exercise of jurisdiction by the court in which the action was first brought. 49

Although many jurisdictions have recognized the doctrine of forum non conveniens as within the power of their courts, 50 at least one jurisdiction has declined to adopt the doctrine. 51

The doctrine of forum non conveniens may apply intrastate, as well as interstate, 52 and it may be applied in actions instituted by writ of foreign attachment. 53

While some authority holds that a court does not have the authority to invoke the doctrine of forum non conveniens on its own motion, 54 other authority state that a court may apply the doctrine on its own motion at any time, even on appeal, so long as the issue is raised at a time and in a manner that will give the parties an opportunity to present evidence regarding circumstances that are relevant to the determination of whether jurisdiction should or should not be retained. 55

◆ Observation: Although stay or dismissal is the usual remedy for litigation brought in an inconvenient forum, the Uniform Transfer of Litigation Act, promulgated in 1991, provides for the transfer of litigation from the courts of one state to the courts of another state upon a finding of forum non conveniens.

◆ Practice guide: A motion to dismiss on the ground of forum non conveniens is

inconsistent with and necessarily phrased in the alternative to a motion to quash service for lack of jurisdiction. This is because the court, in dismissing a suit on grounds of forum non conveniens, relinquishes jurisdiction it already has over the action, whereas the court, in quashing service, determines that it never had jurisdiction over the parties and the cause. 56

---

## Footnotes

Footnote 48. § 132.

Footnote 49. *Gulf Oil Corp. v Gilbert*, 330 US 501, 91 L Ed 1055, 67 S Ct 839 (superseded by statute on other grounds as stated in *Cowan v Ford Motor Co.* (CA5 Miss) 713 F2d 100) and (not followed on other grounds by *Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 478 NYS2d 597, 467 NE2d 245, 57 ALR4th 955) and (criticized on other grounds as stated in *Syndicate 420 at Lloyd's London v Early American Ins. Co.* (CA5 La) 796 F2d 821) and (not followed on other grounds by *Shewbrooks v A. C. & S., Inc.* (Miss) LEXIS slip op) and (superseded by statute on other grounds as stated in *Roberts Metals, Inc. v Florida Properties Mktg. Group* (ND Ohio) 138 FRD 89) and (superseded by statute on other grounds as stated in *American Dredging Co. v Miller* (US) 127 L Ed 2d 285, 114 S Ct 981, 94 CDOS 1288, 93 Daily Journal DAR 2371, 1994 AMC 913, 7 FLW Fed S 754) and (superseded by statute on other grounds as stated in *State ex rel. Smith v Maynard* (W Va) 454 SE2d 46) and (superseded by statute on other grounds as stated in *SSMC, Inc. N.V. v Singer Furniture Acquisition Corp.* (WD Va) 1994 US Dist LEXIS 19571); *Price v Atchison, T. & S. F. R. Co.*, 42 Cal 2d 577, 268 P2d 457, 43 ALR2d 756, cert den 348 US 839, 99 L Ed 661, 75 S Ct 44; *James v Grand T. W. R. Co.*, 14 Ill 2d 356, 152 NE2d 858, 74 ALR2d 814, cert den 358 US 915, 3 L Ed 2d 239, 79 S Ct 288; *Strickland v Humble Oil & Refining Co.*, 194 Miss 194, 11 So 2d 820; *Semanishin v Metropolitan Life Ins. Co.*, 46 NJ 531, 218 A2d 401; *Plum v Tampax, Inc.*, 402 Pa 616, 168 A2d 315, 90 ALR2d 1105, cert den 368 US 826, 7 L Ed 2d 30, 82 S Ct 46.

The doctrine of forum non conveniens is constitutionally sound. *Universal Adjustment Corp. v Midland Bank, Ltd.*, 281 Mass 303, 184 NE 152, 87 ALR 1407; *Loftus v Lee* (Mo) 308 SW2d 654.

**Law Reviews:** Speer, The continued use of forum non conveniens: is it justified? 58 J Air L&C 845 (1993).

**Practice References** Transfers under the forum non conveniens doctrine. 3 Am Jur Trials 611, Selecting the Forum—Defendant's Position § 21.

Footnote 50. *Running v Southwest Freight Lines, Inc.*, 227 Ark 839, 303 SW2d 578 (superseded by statute on other grounds as stated in *Malone & Hyde, Inc. v Chisley*, 308 Ark 308, 825 SW2d 558); *Winsor v United Air Lines, Inc.* (Super) 52 Del 161, 154 A2d 561; *People ex rel. Chesapeake & O. R. Co. v Donovan*, 30 Ill 2d 178, 195 NE2d 634; *Gonzales v Atchison T. & S. F. R. Co.*, 189 Kan 689, 371 P2d 193; *Cray v General Motors Corp.*, 389 Mich 382, 207 NW2d 393, 59 ALR3d 127; *Ramsey v Chicago G. W. R. Co.*, 247 Minn 217, 77 NW2d 176, cert den 352 US 841, 1 L Ed 2d 57, 77 S Ct 63; *Strickland v Humble Oil & Refining Co.*, 194 Miss 194, 11 So 2d 820; *Qualley v Chrysler Credit Corp.*, 191 Neb 787, 217 NW2d 914; *James H. Rhodes & Co. v*

Chausovsky, 137 NJL 459, 60 A2d 623; Silver v Great American Ins. Co., 29 NY2d 356, 328 NYS2d 398, 278 NE2d 619, on remand (1st Dept) 38 App Div 2d 932, 330 NYS2d 156; Chambers v Merrell-Dow Pharmaceuticals, Inc., 35 Ohio St 3d 123, 519 NE2d 370, 76 ALR4th 1; Gulf Oil Co. v Woodson (Okla) 505 P2d 484; Zurick v Inman, 221 Tenn 393, 426 SW2d 767; Summa Corp. v Lancer Indus. (Utah) 559 P2d 544, appeal after remand (Utah) 577 P2d 136; Myers v Boeing Co., 115 Wash 2d 123, 794 P2d 1272.

Footnote 51. Fox v Board of Supervisors of Louisiana State University etc. (La) 576 So 2d 978.

A state may decide whether, and if so to what extent, the doctrine of forum non conveniens should prevail in its courts. Missouri ex rel. Southern R. Co. v Mayfield, 340 US 1, 95 L Ed 3, 71 S Ct 1; Mickel v New England Coal & Coke Co., 132 Conn 671, 47 A2d 187, 171 ALR 1001 (superseded on other grounds by statute as stated in Enquist v General Datacom, 218 Conn 19, 587 A2d 1029).

Footnote 52. Wieser v Missouri P. R. Co., 98 Ill 2d 359, 74 Ill Dec 596, 456 NE2d 98.

Footnote 53. Plum v Tampax, Inc., 402 Pa 616, 168 A2d 315, 90 ALR2d 1105, cert den 368 US 826, 7 L Ed 2d 30, 82 S Ct 46.

Footnote 54. VSL Corp. v Dunes Hotels & Casinos, Inc., 70 NY2d 948, 524 NYS2d 671, 519 NE2d 617.

A trial court abused its discretion where, 16 months after the trial judge took the case under advisement, it dismissed the complaint sua sponte on the ground of forum non conveniens. Wilburn v Wilburn (Dist Col App) 192 A2d 797, 9 ALR3d 538.

Footnote 55. Flaiz v Moore (Tex) 359 SW2d 872, reh'g of cause overr (Oct 3, 1962).

Footnote 56. Credit Lyonnais Bank Nederland, N.V. v Manatt, Phelps, Rothenberg & Tunney (2nd Dist) 202 Cal App 3d 1424, 249 Cal Rptr 559, review den (Oct 27, 1988) and (criticized on other grounds as stated in Beckman v Thompson (2nd Dist) 4 Cal App 4th 481, 6 Cal Rptr 2d 60, 92 CDOS 2084).

**Forms:** Notice–Motion to dismiss action without prejudice–Forum non conveniens. 8A Am Jur Pl & Pr Forms (Rev), Dismissal, Discontinuance, and Nonsuit, Form 92.

Order–Dismissing action without prejudice–Forum non conveniens. 8A Am Jur Pl & Pr Forms (Rev), Dismissal, Discontinuance, and Nonsuit, Form 106.

---

## § 131 Discretion as to application

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

The determination whether to apply the doctrine of forum non conveniens to dismiss an action rests within the discretion of the court. 57 Such determination may not be

arbitrary 58 or abusive. 59 It is a drastic remedy to be exercised with caution and restraint. 60 The doctrine must therefore be applied in conformity with the spirit of the law and in a manner to subserve and not to impede the ends of substantial justice. 61

---

## Footnotes

Footnote 57. *Grove v Washington Nat'l Ins. Co.*, 196 Ark 697, 119 SW2d 503; *Winsor v United Air Lines, Inc. (Super)* 52 Del 161, 154 A2d 561; *People ex rel. Chesapeake & O. R. Co. v Donovan*, 30 Ill 2d 178, 195 NE2d 634; *Kirkland v Greer*, 295 Ky 535, 174 SW2d 745; *Johnson v Chicago, B. & Q. R. Co.*, 243 Minn 58, 66 NW2d 763; *Strickland v Humble Oil & Refining Co.*, 194 Miss 194, 11 So 2d 820; *Elliott v Johnston*, 365 Mo 881, 292 SW2d 589; *James H. Rhodes & Co. v Chausovsky*, 137 NJL 459, 60 A2d 623.

Footnote 58. *Credit Lyonnais Bank Nederland, N.V. v Manatt, Phelps, Rothenberg & Tunney* (2nd Dist) 202 Cal App 3d 1424, 249 Cal Rptr 559, review den (Oct 27, 1988) and (criticized on other grounds as stated in *Beckman v Thompson* (2nd Dist) 4 Cal App 4th 481, 6 Cal Rptr 2d 60, 92 CDOS 2084).

Footnote 59. *Running v Southwest Freight Lines, Inc.*, 227 Ark 839, 303 SW2d 578 (superseded by statute on other grounds as stated in *Malone & Hyde, Inc. v Chisley*, 308 Ark 308, 825 SW2d 558); *People ex rel. Chesapeake & O. R. Co. v Donovan*, 30 Ill 2d 178, 195 NE2d 634; *State of Oklahoma ex rel. Oklahoma Tax Com. v H. D. Lee Co.*, 174 Kan 114, 254 P2d 291; *Ramsey v Chicago G. W. R. Co.*, 247 Minn 217, 77 NW2d 176, cert den 352 US 841, 1 L Ed 2d 57, 77 S Ct 63; *St. Louis S. F. R. Co. v Superior Court, Creek County (Okla)* 290 P2d 118; *Plum v Tampax, Inc.*, 402 Pa 616, 168 A2d 315, 90 ALR2d 1105, cert den 368 US 826, 7 L Ed 2d 30, 82 S Ct 46; *Flaiz v Moore (Tex)* 359 SW2d 872, reh'g of cause overr (Oct 3, 1962).

**Annotation:** Doctrine of forum non conveniens: assumption or denial of jurisdiction of contract action involving foreign elements, 90 ALR2d 1109.

Footnote 60. *Credit Lyonnais Bank Nederland, N.V. v Manatt, Phelps, Rothenberg & Tunney* (2nd Dist) 202 Cal App 3d 1424, 249 Cal Rptr 559, review den (Oct 27, 1988) and (criticized on other grounds as stated in *Beckman v Thompson* (2nd Dist) 4 Cal App 4th 481, 6 Cal Rptr 2d 60, 92 CDOS 2084); *Bechtel Corp. v Industrial Indem. Co. (1st Dist)* 86 Cal App 3d 45, 150 Cal Rptr 29 (superseded by statute on other grounds as stated in *Northrop Corp. v American Motorists Ins. Co. (2nd Dist)* 220 Cal App 3d 1553, 270 Cal Rptr 233).

Footnote 61. *Credit Lyonnais Bank Nederland, N.V. v Manatt, Phelps, Rothenberg & Tunney* (2nd Dist) 202 Cal App 3d 1424, 249 Cal Rptr 559, review den (Oct 27, 1988) and (criticized on other grounds as stated in *Beckman v Thompson* (2nd Dist) 4 Cal App 4th 481, 6 Cal Rptr 2d 60, 92 CDOS 2084).

---

## § 132 Availability of alternate forum as prerequisite

[View Entire Section](#)

A court may not dismiss an action on the ground of forum non conveniens unless the plaintiff could have brought the action before a court other than the court in which he or she did bring it, and he or she still has such an alternate forum. 62 In other words, the doctrine of forum non conveniens presupposes the existence of more than one forum in which jurisdiction may be obtained over the parties and the subject matter of a case, and in which the controversy may be tried. 63 Thus, the doctrine generally may not be applied where the plaintiff's cause of action was barred by the statute of limitations prevailing in the jurisdiction of the other court. 64

At least one jurisdiction, however, follows the view that the availability of an alternative forum is not an absolute condition to dismissal on the ground of forum non conveniens, 65 although it may be a pertinent factor to be considered in applying the doctrine. 66

---

### Footnotes

Footnote 62. *Northrop Corp. v American Motorists Ins. Co.* (2nd Dist) 220 Cal App 3d 1553, 270 Cal Rptr 233, review den; *Allison Drilling Co. v Kaiser Steel Corp.*, 31 Colo App 355, 502 P2d 967 (disapproved on other grounds by *McDonnell-Douglas Corp. v Lohn*, 192 Colo 200, 557 P2d 373); *Miller v United Technologies Corp.*, 40 Conn Supp 457, 515 A2d 390, summary judgment gr (Conn Super) 1993 Conn Super LEXIS 1749, later proceeding (Conn Super) 1993 Conn Super LEXIS 1751 and revd on other grounds, in part, remanded 233 Conn 732; *Domingo v States Marine Lines* (Del Super) 253 A2d 78, affd on other grounds (Del Sup) 269 A2d 223; *Mobley v Southern R. Co.* (Dist Col App) 418 A2d 1044; *British-American Ins. Co. v Cladakis* (Fla App D3) 321 So 2d 448; *Meyers v Bridgeport Machines Div. of Textron, Inc.*, 113 Ill 2d 112, 100 Ill Dec 567, 497 NE2d 745; *Silversmith v Kenosha Auto Transport* (Iowa) 301 NW2d 725; *Carter v Netherton* (Ky) 302 SW2d 382; *Margani v Sanders* (Me) 453 A2d 501; *Robey v Ford Motor Co.*, 155 Mich App 643, 400 NW2d 610; *Hill v Upper Mississippi Towing Corp.*, 252 Minn 165, 89 NW2d 654; *Qualley v Chrysler Credit Corp.*, 191 Neb 787, 217 NW2d 914; *Leeper v Leeper*, 116 NH 116, 354 A2d 137; *Civic Southern Factors Corp. v Bonat*, 65 NJ 329, 322 A2d 436; *Westinghouse Electric Corp. v Aetna Casualty & Surety Co.*, 227 NJ Super 504, 547 A2d 1167, revd on other grounds 233 NJ Super 463, 559 A2d 435 (disapproved on other grounds by *Gilbert Spruance Co. v Pennsylvania Mfrs. Ass'n Ins. Co.*, 134 NJ 96, 629 A2d 885) and (criticized on other grounds in *American Employers' Ins. Co. v Elf Atochem N. Am.* (App Div) 280 NJ Super 601, 656 A2d 58); *Rini v New York C. R. Co.*, 429 Pa 235, 240 A2d 372; *Nienow v Nienow*, 268 SC 161, 232 SE2d 504; *Zurick v Inman*, 221 Tenn 393, 426 SW2d 767; *Werner v Werner*, 84 Wash 2d 360, 526 P2d 370; *Norfolk & W. Ry. v Tsapis*, 184 W Va 231, 400 SE2d 239.

**Annotation:** Forum non conveniens doctrine in state court as affected by availability of alternative forum, 57 ALR4th 973.

Doctrine of forum non conveniens: assumption or denial of jurisdiction of action involving matrimonial disputes, 9 ALR3d 545.

Footnote 63. *Greyhound Corp. v Rosart* (Fla App D3) 124 So 2d 708 (superseded by statute on other grounds as stated in *Peterson, Howell & Heather v O'Neill* (Fla App D3)

314 So 2d 808); *Stein v Volkswagen of America, Inc.* (1st Dist) 135 Ill App 3d 127, 90 Ill Dec 222, 481 NE2d 1022; *Cray v General Motors Corp.*, 389 Mich 382, 207 NW2d 393, 59 ALR3d 127; *Zurick v Inman*, 221 Tenn 393, 426 SW2d 767.

Footnote 64. *Delfosse v C.A.C.I., Inc.-Federal* (2nd Dist) 218 Cal App 3d 683, 267 Cal Rptr 224; *Vandam v Smit*, 101 NH 508, 148 A2d 289.

The availability of a suitable alternative forum encompasses two preliminary questions: (1) whether a statute of limitations precludes litigation in the proposed alternative forum, and (2) whether the defendant is amenable to personal jurisdiction there. *Holmes v Syntex Laboratories, Inc.* (1st Dist) 156 Cal App 3d 372, 202 Cal Rptr 773 (criticized on other grounds by *Corrigan v Bjork Shiley Corp.* (2nd Dist) 182 Cal App 3d 166, 227 Cal Rptr 247) and (criticized on other grounds by *Shiley, Inc. v Superior Court* (4th Dist) 203 Cal App 3d 1376, 250 Cal Rptr 793); *Carr v Bio-Medical Applications of Washington, Inc.* (Dist Col App) 366 A2d 1089.

Footnote 65. *Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 478 NYS2d 597, 467 NE2d 245, 57 ALR4th 955, cert den 469 US 1108, 83 L Ed 2d 778, 105 S Ct 783.

Footnote 66. *Moezinia v Moezinia* (2d Dept) 124 App Div 2d 571, 507 NYS2d 716; *Broukhim v Hay* (2d Dept) 122 App Div 2d 9, 504 NYS2d 467.

---

### **§ 133 Applicability to actions under Federal Employers' Liability Act**

[View Entire Section](#)  
[Go to Parallel Reference Table](#)  
[Go to Supplement](#)

A state court may apply the doctrine of forum non conveniens in an action brought under the Federal Employers' Liability Act (FELA) so long as it does not discriminate against citizens of other states or against FELA actions. 67 The doctrine may not, however, be applicable to FELA actions filed in all jurisdictions. 68

---

### **§ 133 ----Applicability to actions under Federal Employers' Liability Act [SUPPLEMENT]**

#### **Case authorities:**

A state court presiding over an action pursuant to the Federal Employers' Liability Act (FELA) (45 USCS §§ 51 et seq.) is free to decide the availability of the principle of forum non conveniens according to the court's own local law, in that forum non conveniens is a matter of local policy. *American Dredging Co. v Miller* (US) 127 L Ed 2d 285, 114 S Ct 981.

---

#### **Footnotes**

Footnote 67. *Missouri ex rel. Southern R. Co. v Mayfield*, 340 US 1, 95 L Ed 3, 71 S Ct 1; *Price v Atchison, T. & S. F. R. Co.*, 42 Cal 2d 577, 268 P2d 457, 43 ALR2d 756, cert den 348 US 839, 99 L Ed 661, 75 S Ct 44; *Great N. R. Co. v Superior Court of Alameda County (1st Dist)* 12 Cal App 3d 105, 90 Cal Rptr 461, 35 Cal Comp Cas 779, cert den 401 US 1013, 28 L Ed 2d 550, 91 S Ct 1254; *Wieser v Missouri P. R. Co.*, 98 Ill 2d 359, 74 Ill Dec 596, 456 NE2d 98; *Mayhew v Seaboard System Railroad (5th Dist)* 137 Ill App 3d 80, 91 Ill Dec 829, 484 NE2d 388; *Gonzales v Atchison T. & S. F. R. Co.*, 189 Kan 689, 371 P2d 193; *Anderson v Great Lakes Dredge & Dock Co.*, 411 Mich 619, 309 NW2d 539; *State ex rel. Chicago, R. I. & P. R. Co. v Riederer (Mo)* 454 SW2d 36; *St. Louis S. F. R. Co. v Superior Court Creek County (Okla)* 276 P2d 773, supp op (Okla) 290 P2d 118; *Mooney v Denver & R. G. W. R.R.*, 118 Utah 307, 221 P2d 628.

In personal injury action filed under the FELA, generous venue provisions of Act did not preclude transfer of action to the county in which the accident occurred on the basis of the doctrine of forum non conveniens, where the plaintiff was originally treated by doctors in that county, many of the witnesses resided in that county, if a view of premises of accident was appropriate, that also would occur in that county, and most, if not all, of the significant factual connections to the cause of action were in that county rather than in the original county. *State ex rel. Southern Pac. Transp. Co. v Frost*, 102 NM 369, 695 P2d 1318.

As to actions under the Federal Employers' Liability Act, see 32 Am Jur 2d, Federal Employers' Liability and Compensation Act §§ 5-40.

**Annotation:** Circumstances justifying state court's refusal to take jurisdiction of Federal Employers' Liability Act proceeding, 60 ALR3d 965.

Footnote 68. *Labella v Burlington N.*, 182 Mont 202, 595 P2d 1184 (holding that the trial court erred in ordering an action dismissed on the ground of forum non conveniens, since the doctrine of forum non conveniens is inapplicable to FELA suits filed in Montana district courts).

Notwithstanding that the injury occurred in Idaho and most of the witnesses including the plaintiff lived in Washington, the doctrine of forum non conveniens was inapplicable to remove a FELA action from Montana, absent demonstrated abuse. *Bevacqua v Burlington N.*, 183 Mont 237, 598 P2d 1124.

## **B. Factors Relevant to Application of Doctrine [134-146]**

### **Research References**

ALR Digest: Courts § 273.5

ALR Index: Forum Non Conveniens

8A Am Jur Pl & Pr Forms (Rev), Dismissal, Discontinuance, and Nonsuit, Forms 92, 106

3 Am Jur Trials 553, Selecting the Forum—Plaintiff's Position; 3 Am Jur Trials 611, Selecting the Forum—Defendant's Position

### **1. In General [134-140]**



---

## § 134 Generally; presence of foreign elements

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

In determining whether to apply the doctrine of forum non conveniens, the court must review and balance the certain factors relating to the plaintiff, the defendant, the witnesses, the nature of the subject matter, or the court. 69

One factor favoring application of the doctrine of forum non conveniens is the involvement of foreign elements in the action, 70 particularly where the event which gives rise to the cause of action occurred outside of the forum state. 71 By the same token, the fact that the event giving rise to the action took place in the forum state favors the court's retention of jurisdiction. 72 In contrast, the fact that the decision of a case depends on the law of a foreign state is not sufficient to dismiss the action on the ground of forum non conveniens, inasmuch as the full faith and credit clause of the Federal Constitution dictates that the fact that the forum state's law may recognize claims that the law of other states is not sufficient to dismiss a case on the grounds of forum non conveniens, 73 even if the out-of-state law governing the case is unsettled, 74 unless the party opposing dismissal can show that the proposed alternative forum is so inadequate or unsatisfactory that there would be no remedy at all. 75 However, if the law in the foreign jurisdiction is so different from the law of the forum as to be difficult or incapable of administration and enforcement by a court of the forum state or is against the forum state's public policy, application of the doctrine of forum non conveniens may be appropriate. 76

---

### Footnotes

Footnote 69. *Gulf Oil Corp. v Gilbert*, 330 US 501, 91 L Ed 1055, 67 S Ct 839 (superseded by statute on other grounds as stated in *Cowan v Ford Motor Co.* (CA5 Miss) 713 F2d 100) and (not followed on other grounds by *Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 478 NYS2d 597, 467 NE2d 245, 57 ALR4th 955) and (criticized on other grounds as stated in *Syndicate 420 at Lloyd's London v Early American Ins. Co.* (CA5 La) 796 F2d 821) and (not followed on other grounds by *Shewbrooks v A. C. & S., Inc.* (Miss) LEXIS slip op) and (superseded by statute on other grounds as stated in *Roberts Metals, Inc. v Florida Properties Mktg. Group* (ND Ohio) 138 FRD 89) and (superseded by statute on other grounds as stated in *American Dredging Co. v Miller* (US) 127 L Ed 2d 285, 114 S Ct 981, 94 CDOS 1288, 93 Daily Journal DAR 2371, 1994 AMC 913, 7 FLW Fed S 754) and (superseded by statute on other grounds as stated in *State ex rel. Smith v Maynard* (W Va) 454 SE2d 46) and (superseded by statute on other grounds as stated in *SSMC, Inc. N.V. v Singer Furniture Acquisition Corp.* (WD Va) 1994 US Dist LEXIS 19571); *Running v Southwest Freight Lines, Inc.*, 227 Ark 839, 303 SW2d 578 (superseded by statute on other grounds as stated in *Malone & Hyde, Inc. v Chisley*, 308 Ark 308, 825 SW2d 558); *Hemmelgarn v Boeing Co.* (4th Dist) 106 Cal App 3d 576, 165 Cal Rptr 190; *Jagger v Superior Court of Los Angeles County* (2nd Dist) 96 Cal App 3d 579, 158 Cal Rptr 163; *Mills v Aetna Fire Underwriters Ins. Co.* (Dist Col App) 511 A2d 8; *W.R. Grace & Co. v Beker Industries, Inc.* (1st Dist) 128 Ill



App 3d 215, 83 Ill Dec 451, 470 NE2d 577; *Fourth Northwestern Nat'l Bank v Hilson Industries, Inc.*, 264 Minn 110, 117 NW2d 732; *Gore v United States Steel Corp.*, 15 NJ 301, 104 A2d 670, 48 ALR2d 841, cert den 348 US 861, 99 L Ed 678, 75 S Ct 84; *Zurick v Inman*, 221 Tenn 393, 426 SW2d 767; *Flaiz v Moore (Tex)* 359 SW2d 872, reh'g of cause overr (Oct 3, 1962); *Myers v Boeing Co.*, 115 Wash 2d 123, 794 P2d 1272; *Johnson v Spider Staging Corp.*, 87 Wash 2d 577, 555 P2d 997.

**Annotation:** Forum non conveniens in products liability cases, 76 ALR4th 22.

Footnote 70. *Universal Adjustment Corp. v Midland Bank, Ltd.*, 281 Mass 303, 184 NE 152, 87 ALR 1407; *Plum v Tampax, Inc.*, 402 Pa 616, 168 A2d 315, 90 ALR2d 1105, cert den 368 US 826, 7 L Ed 2d 30, 82 S Ct 46.

Footnote 71. *Piper Aircraft Co. v Reyno*, 454 US 235, 70 L Ed 2d 419, 102 S Ct 252, reh den 455 US 928, 71 L Ed 2d 474, 102 S Ct 1296 and (not followed on other grounds by *Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 478 NYS2d 597, 467 NE2d 245, 57 ALR4th 955) and (not followed on other grounds by *Myers v Boeing Co.*, 115 Wash 2d 123, 794 P2d 1272); *Running v Southwest Freight Lines, Inc.*, 227 Ark 839, 303 SW2d 578 (superseded by statute on other grounds as stated in *Malone & Hyde, Inc. v Chisley*, 308 Ark 308, 825 SW2d 558); *Price v Atchison, T. & S. F. R. Co.*, 42 Cal 2d 577, 268 P2d 457, 43 ALR2d 756, cert den 348 US 839, 99 L Ed 661, 75 S Ct 44; *Ellis v Outboard Marine Corp.* (1st Dist) 132 Ill App 3d 532, 87 Ill Dec 875, 478 NE2d 14; *Kirkland v Greer*, 295 Ky 535, 174 SW2d 745; *Elliott v Johnston*, 365 Mo 881, 292 SW2d 589; *Rivera v Parvez* (1st Dept) 108 App Div 2d 640, 485 NYS2d 281, affd 65 NY2d 860, 493 NYS2d 308, 482 NE2d 1224; *Smyth v Twin State Improvement Corp.*, 116 Vt 569, 80 A2d 664, 25 ALR2d 1193.

A New York court did not abuse its discretion in dismissing a complaint on the ground of forum non conveniens where the cause of action arose in South Carolina, the defendant was amenable to suit in that forum, and both the contract and choice-of-law principles compelled application of South Carolina law. *Brown v Dataw Island Realty, Inc.* (4th Dept) 151 App Div 2d 1044, 542 NYS2d 99.

◆ **Observation:** In some jurisdictions, the cause of action must have arisen in a jurisdiction outside of the state in order for the court to apply the doctrine of forum non conveniens. *Oboussier-Lowe v Kuehne & Nagel (A.G. & Co.)* (Fla App D5) 531 So 2d 249, 13 FLW 2190; *Morgan v Ande* (Fla App D4) 313 So 2d 86.

**Annotation:** Doctrine of forum non conveniens: assumption or denial of jurisdiction in action between nonresident individuals based upon tort occurring within forum state, 92 ALR3d 797.

Footnote 72. *Florida Education Assoc. v National Education Assoc.* (Dist Col App) 354 A2d 853 (contract negotiated and breached in forum state); *Brummett v Wepfer Marine, Inc.*, 111 Ill 2d 495, 95 Ill Dec 841, 490 NE2d 694; *Unitech USA, Inc. v Ponsoldt* (1st Dept) 91 App Div 2d 903, 457 NYS2d 526, app dismd 58 NY2d 1113; *Unigraphic, Inc. v Star Wars Corp.* (1st Dept) 79 App Div 2d 944, 435 NYS2d 19.

Footnote 73. *Hughes v Fetter*, 341 US 609, 95 L Ed 1212, 71 S Ct 980; *Shiley Inc. v Superior Court* (4th Dist) 4 Cal App 4th 126, 6 Cal Rptr 2d 38, 92 CDOS 1940, 92 Daily Journal DAR 2945, review den (Cal) 1992 Cal LEXIS 2934; *Asch v Taveres* (Dist Col

App) 467 A2d 976 (forum court was familiar with the law of the out-of-state jurisdiction and would not have great difficulty applying it in the action); *James v Grand T. W. R. Co.*, 14 Ill 2d 356, 152 NE2d 858, 74 ALR2d 814, cert den 358 US 915, 3 L Ed 2d 239, 79 S Ct 288 (action based on the wrongful death statute of a sister state).

So long as some remedy is afforded, the fact that an alternative jurisdiction's law may be less favorable to a litigant than the law of the forum should not be accorded any weight in deciding a motion for forum non conveniens. *Piper Aircraft Co. v Reyno*, 454 US 235, 70 L Ed 2d 419, 102 S Ct 252, reh den 455 US 928, 71 L Ed 2d 474, 102 S Ct 1296 and (not followed on other grounds by *Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 478 NYS2d 597, 467 NE2d 245, 57 ALR4th 955) and (not followed on other grounds by *Myers v Boeing Co.*, 115 Wash 2d 123, 794 P2d 1272); *Stangvik v Shiley, Inc.*, 54 Cal 3d 744, 1 Cal Rptr 2d 556, 819 P2d 14, 91 Daily Journal DAR 14320.

Where the agreement upon which the dispute rested provided that its terms were to be governed and construed according to the laws of the forum state, dismissal on the ground of forum non conveniens is unjustified. *Bankers Trust Co. v Kline* (1st Dept) 52 App Div 2d 775, 382 NYS2d 795; *State ex rel. Farmland Industries, Inc. v Elliott* (Mo App) 560 SW2d 60.

**Annotation:** Forum non conveniens doctrine in state court as affected by availability of alternative forum, 57 ALR4th 973.

Doctrine of forum non conveniens: assumption or denial of jurisdiction of contract action involving foreign elements, 90 ALR2d 1109.

Footnote 74. *Kolber v Holyoke Shares, Inc.* (Sup) 59 Del 66, 213 A2d 444.

Footnote 75. *McCracken v Eli Lilly & Co.* (Ind App) 494 NE2d 1289.

Footnote 76. *Flaiz v Moore* (Tex) 359 SW2d 872, reh'g of cause overr (Oct 3, 1962).

---

## § 135 Balancing of conveniences

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

A balancing of conveniences is essential to a proper determination of whether the doctrine of forum non conveniens should be applied. <sup>77</sup> Unless the balance, upon weighing the relative advantages and obstacles to a fair trial, is strongly in favor of the defendant, the plaintiff's choice of forum should not be disturbed. <sup>78</sup>

The declining of jurisdiction on the ground that another forum is more convenient will not be prevented by the fact that in the other forum the plaintiff may recover a smaller amount than he or she is likely to recover in the forum in which he or she has brought the action, <sup>79</sup> and the mere fact that a different forum might better suit the convenience of defendant is insufficient to support a forum non conveniens motion. <sup>80</sup>

---

**Footnotes**

Footnote 77. Dietrich v Texas Nat'l Petroleum Co. (Super) 56 Del 435, 193 A2d 579 (court may take into account advanced age of defendant); Fourth Northwestern Nat'l Bank v Hilson Industries, Inc., 264 Minn 110, 117 NW2d 732.

The forum non conveniens doctrine was properly applied where trial in California would have far more serious economic implications for defendant than trial elsewhere for the plaintiff where the plaintiff was a national corporation with substantial resources and the defendant was a small company located solely in a foreign jurisdiction. Gould, Inc. v Health Sciences, Inc. (2nd Dist) 54 Cal App 3d 687, 126 Cal Rptr 726.

Footnote 78. Wieser v Missouri P. R. Co., 98 Ill 2d 359, 74 Ill Dec 596, 456 NE2d 98 (declining jurisdiction where the residence of the party's attorney in the forum was the only connection between the action and the forum); Mayhew v Seaboard System Railroad (5th Dist) 137 Ill App 3d 80, 91 Ill Dec 829, 484 NE2d 388 (defendant's counsel); Summa Corp. v Lancer Indus. (Utah) 559 P2d 544, appeal after remand (Utah) 577 P2d 136 (holding that whether dismissal would impose an unreasonable burden by requiring the plaintiff to again go through the procedure in another state of engaging counsel and getting an action underway may be a consideration).

Footnote 79. Wieser v Missouri P. R. Co., 98 Ill 2d 359, 74 Ill Dec 596, 456 NE2d 98.

Footnote 80. Texas Gulf Sulphur Co. v Downtown Inv. Co. (Fla App D1) 188 So 2d 19, cert dismd (Fla) 196 So 2d 436.

---

**§ 136 Plaintiff's vexatious intent in bringing suit in forum jurisdiction**

|   |
|---|
| <p><a href="#">View Entire Section</a><br/><a href="#">Go to Parallel Reference Table</a></p> |
|---|

Exercise of jurisdiction may be refused where the plaintiff's selection of the forum is vexatious to the defendant. 81 While there is authority for the view that it is not necessary to show that the plaintiff chose the forum with an actual intent to harass or vex the defendant, 82 there is also authority for the view that a motion to dismiss on the ground of forum non conveniens may be denied where there is no evidence that the plaintiff had an improper intent in bringing the suit in the forum jurisdiction. 83

---

**Footnotes**

Footnote 81. James v Grand T. W. R. Co., 14 Ill 2d 356, 152 NE2d 858, 74 ALR2d 814, cert den 358 US 915, 3 L Ed 2d 239, 79 S Ct 288; Lau v Chicago & N. W. R. Co., 14 Wis 2d 329, 111 NW2d 158.

Footnote 82. People ex rel. Chesapeake & O. R. Co. v Donovan, 30 Ill 2d 178, 195 NE2d 634.

Footnote 83. *Asch v Taveres* (Dist Col App) 467 A2d 976.

**Practice References** Proof of choice of inconvenient forum in matrimonial dispute to vex and harass defendant. 16 Am Jur POF2d 175, Matrimonial dispute: Vexatious choice of forum §§ 9-20.

---

## § 137 Location or residence of witnesses

[View Entire Section](#)  
[Go to Parallel Reference Table](#)  
[Go to Supplement](#)

A court may decline jurisdiction under the doctrine of forum non conveniens where the witnesses reside out of state, particularly where the event occurred in the state of the witnesses' residence. 84 However, a party's speculative allegation that there may exist out-of-state witnesses not subject to compulsory process by the forum state is not sufficient in itself to support dismissal of the action on the ground of forum non conveniens. 85

The witnesses' residence in the forum or easy procurement to the forum is a factor in favor of retaining jurisdiction; 86 however, the fact that the plaintiff's expert witnesses are present in the forum is entitled to no consideration in determining convenience, inasmuch as a contrary rule would permit the plaintiff to circumvent the rule by employing experts located in inconvenient fora. 87

---

## § 137 ----Location or residence of witnesses [SUPPLEMENT]

### Case authorities:

In determining whether to grant motion based on forum non conveniens, court must first determine whether alternate forum is suitable place for trial; if it is, next step is to consider private interests of litigants and interests of public in retaining action for trial in forum state. Private-interest factors are those that make trial and enforceability of ensuing judgment expeditious and relatively inexpensive, such as ease of access to sources of proof, cost of obtaining attendance of witnesses, and availability of compulsory process for attendance of unwilling witnesses. Public-interest factors include avoidance of overburdening local courts with congested calendars, protecting interests of potential jurors, and weighing competing interests of forum and alternate jurisdiction in the litigation. Based on these factors, California court declined to exercise jurisdiction over product-liability action by Nevada residents against foreign automobile manufacturers and their California subsidiaries. *Rinauro v Honda Motor Co.* (1995, 2nd Dist) 31 Cal App 4th 506, 37 Cal Rptr 2d 181, 95 CDOS 342, 95 Daily Journal DAR 532.

---

## Footnotes

Footnote 84. *Matthews v Wolvin* (CA5 Fla) 266 F2d 722; *Running v Southwest Freight Lines, Inc.*, 227 Ark 839, 303 SW2d 578 (superseded by statute on other grounds as stated in *Malone & Hyde, Inc. v Chisley*, 308 Ark 308, 825 SW2d 558); *St. Louis S. F. R. Co. v Superior Court, Creek County* (Okla) 290 P2d 118.

Forum non conveniens should have been applied by a Pennsylvania court where the plaintiff, who resided in Kentucky, was injured and received treatment in Kentucky, and all witnesses except plaintiff's expert resided there or in West Virginia and were not subject to compulsory process of Pennsylvania court. *Norman v Norfolk & W. R. Co.*, 228 Pa Super 319, 323 A2d 850.

Footnote 85. *Robey v Ford Motor Co.*, 155 Mich App 643, 400 NW2d 610.

A manufacturer was not entitled to dismissal on the basis of forum non conveniens in an action brought by a resident of the forum for personal injuries, due in part to the fact that the manufacturer failed to identify any nonparty witness who resided outside the forum and would be inconvenienced by a trial in the forum. *Bock v Rockwell Mfg. Co.* (2d Dept) 151 App Div 2d 629, 543 NYS2d 89.

Footnote 86. *Washington v May Dep't Stores* (Dist Col App) 388 A2d 484; *Unigraphic, Inc. v Star Wars Corp.* (1st Dept) 79 App Div 2d 944, 435 NYS2d 19; *Johnson v Spider Staging Corp.*, 87 Wash 2d 577, 555 P2d 997.

Footnote 87. *Lowe v Norfolk & W. R. Co.* (5th Dist) 124 Ill App 3d 80, 79 Ill Dec 238, 463 NE2d 792, app den (Ill) 81 Ill Dec 711, 467 NE2d 582 and later proceeding (5th Dist) 133 Ill App 3d 597, 88 Ill Dec 709, 479 NE2d 322, revd 112 Ill 2d 223, 97 Ill Dec 454, 492 NE2d 1327, 56 ALR4th 1191 and (among conflicting authorities on other grounds noted in *AMF, Inc. v Victor J. Andrew High School* (1st Dist) 172 Ill App 3d 337, 122 Ill Dec 325, 526 NE2d 584).

---

## § 138 Court backlog

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

In determining whether jurisdiction should be refused with regard to a particular case on the ground of forum non conveniens, a court may consider the fact that it is overcrowded with litigation having a closer connection with the forum state than does the case in question, so long as it applies the rule to citizens and noncitizens of the state indiscriminately. 88 The court may examine such matters as the complexity of the case, whether it would consume considerable court time, and the condition of the court's docket to determine whether retaining jurisdiction is appropriate. 89 A court may also consider whether declining jurisdiction would favor judicial economy 90 and avoid the multiplicity of actions, 91 The court may not, however, use its backlog, standing alone, as justification for dismissing an action. 92

---

## Footnotes

Footnote 88. *Missouri ex rel. Southern R. Co. v Mayfield*, 340 US 1, 95 L Ed 3, 71 S Ct 1; *Price v Atchison, T. & S. F. R. Co.*, 42 Cal 2d 577, 268 P2d 457, 43 ALR2d 756, cert den 348 US 839, 99 L Ed 661, 75 S Ct 44; *Johnson v Chicago, B. & Q. R. Co.*, 243 Minn 58, 66 NW2d 763; *St. Louis S. F. R. Co. v Superior Court Creek County (Okla)* 276 P2d 773, supp op (Okla) 290 P2d 118.

Footnote 89. *Stangvik v Shiley, Inc.*, 54 Cal 3d 744, 1 Cal Rptr 2d 556, 819 P2d 14, 91 Daily Journal DAR 14320; *Kourdoglanian v Yannoulis (1st Dist)* 227 Ill App 3d 898, 169 Ill Dec 835, 592 NE2d 322.

Footnote 90. *Dendy v MGM Grand Hotels, Inc. (4th Dist)* 137 Cal App 3d 457, 187 Cal Rptr 95.

Footnote 91. *International Sales & Lease, Inc. v Seven Bar Flying Service, Inc.*, 12 Wash App 894, 533 P2d 445.

Dismissal was appropriate where the plaintiff had already filed suit in another jurisdiction and, thus, failing to dismiss would subject the defendant to two suits on the same issues. *Klein v Superior Court (6th Dist)* 198 Cal App 3d 894, 244 Cal Rptr 226, review den (Apr 6, 1988).

Footnote 92. *Bellin v Johns-Manville Sales Corp.*, 141 Mich App 128, 366 NW2d 20.

---

### § 139 Adequacy of suit in courts of foreign country

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

A suit may not be dismissed on the ground of forum non conveniens where the alternative forum in a foreign country does not permit litigation of the subject matter of the dispute, 93 the respondent is not required to appear in the foreign court, 94 or the foreign nation's law is otherwise deficient. 95

However, at least one jurisdiction has dismissed an action on the grounds of forum non conveniens despite the fact that any judgment obtained in the alternative forum in the foreign country would be uncollectable. 96

Although some jurisdictions have determined that an American court should rarely dismiss a case on the ground of forum non conveniens when the only alternative forum is a foreign one, 97 generally, where an available remedy exists in the foreign country, that country's courts may constitute a convenient alternative forum. 98

---

### Footnotes

Footnote 93. *Piper Aircraft Co. v Reyno*, 454 US 235, 70 L Ed 2d 419, 102 S Ct 252, reh den 455 US 928, 71 L Ed 2d 474, 102 S Ct 1296 and (not followed on other

grounds by *Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 478 NYS2d 597, 467 NE2d 245, 57 ALR4th 955) and (not followed on other grounds by *Myers v Boeing Co.*, 115 Wash 2d 123, 794 P2d 1272).

In a divorce action between Egyptian citizens, a forum non conveniens motion was not granted where Texas provided the only forum for litigation since the wife had no ability to sue for divorce under Egyptian law. *Ismail v Ismail* (Tex App Houston (1st Dist)) 702 SW2d 216, writ ref n r e (Jun 11, 1986) and reh'g of writ of error overr (Jul 16, 1986).

**Annotation:** Forum non conveniens doctrine in state court as affected by availability of alternative forum, 57 ALR4th 973.

Doctrine of forum non conveniens: assumption or denial of jurisdiction of action involving matrimonial disputes, 9 ALR3d 545.

Footnote 94. *Swift & Co. Packers v Compania Colombiana Del Caribe, S. A.*, 339 US 684, 94 L Ed 1206, 70 S Ct 861, 19 ALR2d 630 (ovrld on other grounds as stated in *Demens v Tinton 35, Inc.* (CA3 NJ) 873 F2d 50).

Footnote 95. *Magnecomp Corp. v Athene Co.* (2nd Dist) 209 Cal App 3d 526, 257 Cal Rptr 278 (holding that Japan was not a more accessible forum in a California corporation's action against a Japanese corporation and its agent for alleged misappropriation of trade secrets, given its relatively slight interest in protecting California's trade secrets or providing California plaintiffs a forum to sue Japanese defendants).

Denial of a forum non conveniens motion filed in a marital dissolution action by the wife who lived in Japan was appropriate since a ruling in the wife's favor would have resulted in no dissolution at all since Japan, unlike Iowa, did not have no-fault divorce. *In re Marriage of Kimura* (Iowa) 471 NW2d 869.

Footnote 96. *Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 478 NYS2d 597, 467 NE2d 245, 57 ALR4th 955, cert den 469 US 1108, 83 L Ed 2d 778, 105 S Ct 783.

Footnote 97. *Dorati v Dorati* (Dist Col App) 342 A2d 18.

The court refused to dismiss a products liability case on the ground of forum non conveniens where an American citizen would be relegated to the courts of a foreign country. *Weinberger v S. A. Empresa de Viacao Aerea Rio Grandense (Varig)*, 52 Misc 2d 357, 275 NYS2d 453.

**Annotation:** Forum non conveniens in products liability cases, 76 ALR4th 22.

Footnote 98. *Joly v Albert Larocque Lumber, Ltd.*, 397 Mass 43, 489 NE2d 698 (Canada appropriate forum); *Heaps v Simon & Schuster Co.* (1st Dept) 150 App Div 2d 164, 540 NYS2d 437, amd, on reh (1st Dept) 152 App Div 2d 468; *Myers v Boeing Co.*, 115 Wash 2d 123, 794 P2d 1272.

Egypt constituted an adequate alternative forum in an action against an American manufacturer and designer of aircraft that crashed in Egypt, killing two members of the Egyptian Air Force, where Egyptian law provided for recovery of tort liability, including

damages for loss suffered, lost profits, moral loss, and damages for pain and suffering to the decedent's immediate family despite the lack of juries or contingency fees. *Miller v United Technologies Corp.*, 40 Conn Supp 457, 515 A2d 390, summary judgment gr (Conn Super) 1993 Conn Super LEXIS 1749, later proceeding (Conn Super) 1993 Conn Super LEXIS 1751 and revd, in part, on other grounds remanded 233 Conn 732.

---

## § 140 Delay in invoking doctrine

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

Delay in invoking the doctrine of forum non conveniens may be considered by the court in the exercise of its discretion to grant or to deny a motion based on the doctrine. 99 Although a defendant may waive the issue of forum non conveniens by failing to invoke the doctrine in a timely manner, 1 there is support for the view that the defendant may invoke the doctrine after the case has gone to trial. 2

---

### Footnotes

Footnote 99. *Dietrich v Texas Nat'l Petroleum Co.* (Super) 56 Del 435, 193 A2d 579.

Where the wife in a divorce case did not file her motion for dismissal on grounds of forum non conveniens until the day of trial, following the denial three days earlier of her motion for continuance, and the trial court found that the motion to dismiss for forum non conveniens was made solely for the purposes of delay, the denial of the motion was not an abuse of discretion. *Arthur v Arthur* (Dist Col App) 452 A2d 160.

But see *Mayhew v Seaboard System Railroad* (5th Dist) 137 Ill App 3d 80, 91 Ill Dec 829, 484 NE2d 388 (grant of motion to dismiss for forum non conveniens was not an abuse of discretion even though motion was made 10 months after service of process; delay in raising forum non conveniens issues is only one factor to be considered in ruling on motion, and in the case at bar no factor other than delay favored retention of the case).

Footnote 1. *Wilburn v Wilburn* (Dist Col App) 192 A2d 797, 9 ALR3d 538 (motion to dismiss for forum non conveniens is too late if made at the close of trial); *Bock v Rockwell Mfg. Co.* (2d Dept) 151 App Div 2d 629, 543 NYS2d 89 (holding the defendant guilty of laches in having participated in the action for 15 months before making a motion to dismiss).

Footnote 2. *McLam v McLam*, 85 NM 196, 510 P2d 914; *Flaiz v Moore* (Tex) 359 SW2d 872, reh'g of cause overr (Oct 3, 1962).

## 2. Citizenship or Residence of Parties [141-146]



---

## § 141 Generally

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

The fact that the parties to an action are noncitizens or nonresidents of the state may be taken into consideration in determining whether to apply the doctrine of forum non conveniens. <sup>3</sup> Some jurisdictions have adopted the position that the strong presumption in favor of the plaintiff's choice of forum applies with less force when the plaintiff or real parties in interest are nonresidents. <sup>4</sup> However, the fact that the litigants are nonresidents is not in itself sufficient ground for dismissing an action where the court has jurisdiction and may do full justice without any inconvenience to the parties. <sup>5</sup> In addition, although the residence of the plaintiff in the state where the action is brought does not prevent the application of the doctrine of forum non conveniens, otherwise applicable under the particular circumstances, where the plaintiff is an assignee of a nonresident assignor of a claim against a nonresident, <sup>6</sup> some states follow the view that the doctrine of forum non conveniens is inapplicable where one of the parties is a resident of the state, or is doing business in the state, or has a permit to do business in the state. <sup>7</sup> In some jurisdictions, only where none of the parties involved in the suit are residents of the state, the court may dismiss on the ground of forum non conveniens, <sup>8</sup>

---

### Footnotes

Footnote 3. *Price v Atchison, T. & S. F. R. Co.*, 42 Cal 2d 577, 268 P2d 457, 43 ALR2d 756, cert den 348 US 839, 99 L Ed 661, 75 S Ct 44; *Appalachian Ins. Company v Superior Court* (2nd Dist) 162 Cal App 3d 427, 208 Cal Rptr 627; *Jagger v Superior Court of Los Angeles County* (2nd Dist) 96 Cal App 3d 579, 158 Cal Rptr 163; *James v Grand T. W. R. Co.*, 14 Ill 2d 356, 152 NE2d 858, 74 ALR2d 814, cert den 358 US 915, 3 L Ed 2d 239, 79 S Ct 288; *Cray v General Motors Corp.*, 389 Mich 382, 207 NW2d 393, 59 ALR3d 127 (a court may dismiss an action on the ground of forum non convenience brought by an out-of-state plaintiff); *Elliott v Johnston*, 365 Mo 881, 292 SW2d 589; *Vandam v Smit*, 101 NH 508, 148 A2d 289; *Semanishin v Metropolitan Life Ins. Co.*, 46 NJ 531, 218 A2d 401.

Where each party had been a resident in the forum but had since become the resident of another state, the court had discretion to decline to exercise its continuing jurisdiction over an action. *Madsen v Madsen*, 111 NH 315, 282 A2d 667; *Vercimak v Vercimak* (Mo App) 762 SW2d 529; *In re Marriage of Clark* (2d Dist) 232 Ill App 3d 342, 173 Ill Dec 532, 597 NE2d 240; *List v List*, 224 NJ Super 432, 540 A2d 916.

In an action by a resident of New Jersey against a physician, who practices medicine in New Jersey, to recover for injuries sustained in a skiing accident in Pennsylvania, a refusal to apply the doctrine of forum non conveniens was reversed where the reviewing court determined that a motion to permit attachment of the defendant's medical malpractice insurance policy, the carrier being licensed to transact business in New York, should be denied, since the case involved both a nonresident plaintiff and a nonresident defendant and arose out of alleged acts in another state. *Donawitz v Danek*, 42 NY2d 138, 397 NYS2d 592, 366 NE2d 253.

**Annotation:** Doctrine of forum non conveniens: assumption or denial of jurisdiction in action between nonresident individuals based upon tort occurring within forum state, 92 ALR3d 797.

Footnote 4. Celotex Corp. v American Ins. Co. (1st Dist) 199 Cal App 3d 678, 245 Cal Rptr 429, review den (Jan 6, 1988); Lowe v Norfolk & W. R. Co. (5th Dist) 124 Ill App 3d 80, 79 Ill Dec 238, 463 NE2d 792, app den (Ill) 81 Ill Dec 711, 467 NE2d 582 and later proceeding (5th Dist) 133 Ill App 3d 597, 88 Ill Dec 709, 479 NE2d 322, revd 112 Ill 2d 223, 97 Ill Dec 454, 492 NE2d 1327, 56 ALR4th 1191 and (among conflicting authorities on other grounds noted in AMF, Inc. v Victor J. Andrew High School (1st Dist) 172 Ill App 3d 337, 122 Ill Dec 325, 526 NE2d 584).

Footnote 5. Kolber v Holyoke Shares, Inc. (Sup) 59 Del 66, 213 A2d 444; Silver v Great American Ins. Co., 29 NY2d 356, 328 NYS2d 398, 278 NE2d 619, on remand (1st Dept) 38 App Div 2d 932, 330 NYS2d 156 (holding that application of the doctrine of forum non conveniens should turn on considerations of justice, fairness, and convenience, and not solely on the residence of one of the parties); Zurick v Inman, 221 Tenn 393, 426 SW2d 767.

Footnote 6. Universal Adjustment Corp. v Midland Bank, Ltd., 281 Mass 303, 184 NE 152, 87 ALR 1407.

Footnote 7. Flaiz v Moore (Tex Civ App San Antonio) 353 SW2d 74, writ granted (Tex) 5 Tex Sup Ct Jour 359 and revd on other grounds (Tex) 359 SW2d 872, reh'g of cause overr (Oct 3, 1962).

Footnote 8. Murdoch v A.P. Green Industries, Inc. (Fla App D3) 603 So 2d 655, 17 FLW D 1894; Flaiz v Moore (Tex Civ App San Antonio) 353 SW2d 74, writ granted (Tex) 5 Tex Sup Ct Jour 359 and revd on other grounds (Tex) 359 SW2d 872, reh'g of cause overr (Oct 3, 1962).

---

## § 142 Effect of plaintiff's residency in forum state

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

Where the plaintiff is a resident of the forum state, the doctrine of forum non conveniens is generally inapplicable except where private and public interest factors clearly point towards trial in the alternative forum. <sup>9</sup> However, dismissal is not automatically barred when a plaintiff has filed suit in his or her home forum, since if trial in the chosen forum would be unnecessarily burdensome for the defendant or the court, dismissal is proper. <sup>10</sup> Dismissal may also be appropriate where the plaintiff has only resided in the forum for a short time and other factors make another forum more appropriate. <sup>11</sup>

---

### Footnotes

Footnote 9. *Piper Aircraft Co. v Reyno*, 454 US 235, 70 L Ed 2d 419, 102 S Ct 252, reh den 455 US 928, 71 L Ed 2d 474, 102 S Ct 1296 and (not followed on other grounds by *Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 478 NYS2d 597, 467 NE2d 245, 57 ALR4th 955) and (not followed on other grounds by *Myers v Boeing Co.*, 115 Wash 2d 123, 794 P2d 1272); *Kolber v Holyoke Shares, Inc.* (Sup) 59 Del 66, 213 A2d 444.

The doctrine of *forum non conveniens* will not be applied to an action brought in California by a California resident unless the balance is strongly in favor of the defendant. *Bechtel Corp. v Industrial Indem. Co.* (1st Dist) 86 Cal App 3d 45, 150 Cal Rptr 29 (superseded by statute on other grounds as stated in *Northrop Corp. v American Motorists Ins. Co.* (2nd Dist) 220 Cal App 3d 1553, 270 Cal Rptr 233).

When the plaintiff's home forum is chosen, it is reasonable to presume that the choice is convenient. *Lowe v Norfolk & W. R. Co.* (5th Dist) 124 Ill App 3d 80, 79 Ill Dec 238, 463 NE2d 792, app den (Ill) 81 Ill Dec 711, 467 NE2d 582 and later proceeding (5th Dist) 133 Ill App 3d 597, 88 Ill Dec 709, 479 NE2d 322, revd 112 Ill 2d 223, 97 Ill Dec 454, 492 NE2d 1327, 56 ALR4th 1191 and (among conflicting authorities on other grounds noted in *AMF, Inc. v Victor J. Andrew High School* (1st Dist) 172 Ill App 3d 337, 122 Ill Dec 325, 526 NE2d 584); *Wieser v Missouri P. R. Co.*, 98 Ill 2d 359, 74 Ill Dec 596, 456 NE2d 98.

Footnote 10. *Piper Aircraft Co. v Reyno*, 454 US 235, 70 L Ed 2d 419, 102 S Ct 252, reh den 455 US 928, 71 L Ed 2d 474, 102 S Ct 1296 and (not followed on other grounds by *Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 478 NYS2d 597, 467 NE2d 245, 57 ALR4th 955) and (not followed on other grounds by *Myers v Boeing Co.*, 115 Wash 2d 123, 794 P2d 1272); *Elliott v Johnston*, 365 Mo 881, 292 SW2d 589.

The fact that all of the parties to an action may have been New York residents was not dispositive in determining whether an action should have been dismissed on the grounds of *forum non conveniens*, and the trial court did not abuse its discretion in ordering such dismissal, since the residence of the parties in New York was but one factor to be considered. *Westwood Associates v Deluxe General, Inc.*, 53 NY2d 618, 438 NYS2d 774, 420 NE2d 966.

Footnote 11. *Corning v Corning (Me)* 563 A2d 379 (holding that the trial court acted within its discretion in dismissing a husband's divorce action on the grounds of *forum non conveniens*, where the husband had only recently moved the forum state from the state in which both parties had resided during most of the marriage, the parties had hired counsel in that state who spent considerable time and effort to resolve the divorce under that state's laws, the husband had considerable assets there, it was more convenient for witnesses to testify there, and while the wife would likely not voluntarily submit herself to the forum state's jurisdiction, the husband could likely be served in the other state).

If the doctrine of *forum non conveniens* is otherwise applicable, its application is not prevented by the fact that the plaintiff, after the commencement of his or her action, has become a citizen and resident of the state in which he or she brought it. *St. Louis S. F. R. Co. v Superior Court, Creek County (Okla)* 290 P2d 118.

---

## **§ 143 Citizenship or residence of defendant; generally**

The court may consider as a factor in favor of applying the doctrine of forum non conveniens that the defendant is a nonresident. 12 The residency of a defendant or defendants in the forum state is a factor favoring retention of the action. 13 Thus, dismissal may be appropriate in an action against a nonresident defendant, while not appropriate against a defendant who resided in the forum. 14 However, the fact that a defendant is not a resident is in itself insufficient to justify dismissal based on forum non conveniens. 15

---

## Footnotes

Footnote 12. *Smyth v Twin State Improvement Corp.*, 116 Vt 569, 80 A2d 664, 25 ALR2d 1193.

In action brought by an Iowa corporation against a New York corporation to recover a down payment made to defendant prior to plaintiff's cancellation of the contract, the relative inconveniences were not so unbalanced as to require that the Iowa court deny jurisdiction under the doctrine of forum non conveniens where defendant's representatives came into Iowa in an attempt to sell merchandise to the plaintiff, the contract formed contemplated future activity by the defendant within Iowa for an indefinite time period, and the defendant would have had to use the Iowa courts had the plaintiff breached its contractual obligations. *Douglas Machine & Engineering Co. v Hyflow Blanking Press Corp.* (Iowa) 229 NW2d 784.

Forum non conveniens did not apply where the manufacturer defendant was incorporated in the forum state as it is considered a resident of that state. *Buckholt v Second Judicial Dist. Court*, 94 Nev 631, 584 P2d 672.

The doctrine of forum non conveniens was applicable where the litigation's only connection with the forum state arose because defendant was licensed to do business there and could be served with process. *Semanishin v Metropolitan Life Ins. Co.*, 46 NJ 531, 218 A2d 401.

Footnote 13. *Nevader v Deyo* (3d Dept) 111 App Div 2d 548, 489 NYS2d 420.

Footnote 14. *Avins v Weeks* (1st Dept) 78 App Div 2d 800, 433 NYS2d 114 (wherein the court held that in an action in which the material events underlying the cause arose in Delaware, the jurisdiction to which the action had been relegated, dismissal of the action as to a nonresident defendant was proper where there was no real or substantial nexus with New York, but it was error to dismiss the action against a defendant who was a New York resident, who was served in New York and yet failed to appear).

Footnote 15. *Van Winkle-Hooker Co. v Rice* (Tex Civ App Dallas) 448 SW2d 824.

In action against two foreign corporations to recover for the use and occupancy of a tract of land located in another state, the trial court did not abuse its discretion in refusing to dismiss under the doctrine of forum non conveniens since the action was a contract action

in which several plaintiffs were residents of the forum state. *Farha v Signal Cos.*, 216 Kan 471, 532 P2d 1330, mod on other grounds and reh den 217 Kan 43, 535 P2d 463.

---

## § 144 --Foreign corporation as defendant

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

The doctrine of forum non conveniens is an adequate instrumentality through which justice can be served where a foreign corporation is sued for tort, 16 particularly where the action involves a nonresident corporation's internal affairs. 17 However, statutes in some jurisdictions have abolished the doctrine of forum non conveniens with regard to cases involving out-of-state corporations having permits to conduct business in the state. 18

---

### Footnotes

Footnote 16. *Smyth v Twin State Improvement Corp.*, 116 Vt 569, 80 A2d 664, 25 ALR2d 1193.

Footnote 17. *Lonergan v Crucible Steel Co.*, 37 Ill 2d 599, 229 NE2d 536; *Belk v Belk's Dep't Store, Inc.*, 250 NC 99, 108 SE2d 131, 72 ALR2d 1203; *Plum v Tampax, Inc.*, 399 Pa 553, 160 A2d 549.

The limitation on the doctrine of forum non conveniens that it ordinarily may not be invoked to deprive a resident plaintiff of access to the state's courts did not apply to a national corporation that could claim residence in many states due to its far-flung operations. *Gould, Inc. v Health Sciences, Inc.* (2nd Dist) 54 Cal App 3d 687, 126 Cal Rptr 726.

As to the exercise of jurisdiction over the internal affairs of a foreign corporation, see 36 Am Jur 2d, *Foreign Corporations* §§ 407-422.

Footnote 18. *'21' Int'l Holdings, Inc. v Westinghouse Elec. Corp.* (Tex App San Antonio) 856 SW2d 479.

---

## § 145 Status of plaintiff as citizen of sister state

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

The application of the doctrine of forum non conveniens so as to refuse to exercise jurisdiction in an action brought by a citizen of a sister state is not repugnant to the

privileges and immunities clause of the Federal Constitution, if under the particular circumstances the exercise of jurisdiction would have been refused had the plaintiff been a citizen of the forum state. 19 Thus, although courts of a particular state may, because of crowded calendars, refuse under the doctrine of forum non conveniens to exercise jurisdiction in suits brought by nonresidents, they must apply this rule to citizens and noncitizens of the state alike. They cannot, without violating the privileges and immunities clause, apply such a rule to nonresident noncitizens but not to nonresident citizens. 20

---

## Footnotes

Footnote 19. *Grove v Washington Nat'l Ins. Co.*, 196 Ark 697, 119 SW2d 503; *Price v Atchison, T. & S. F. R. Co.*, 42 Cal 2d 577, 268 P2d 457, 43 ALR2d 756, cert den 348 US 839, 99 L Ed 661, 75 S Ct 44; *Whitney v Madden*, 400 Ill 185, 79 NE2d 593, cert den 335 US 828, 93 L Ed 382, 69 S Ct 55; *Gore v United States Steel Corp.*, 15 NJ 301, 104 A2d 670, 48 ALR2d 841, cert den 348 US 861, 99 L Ed 678, 75 S Ct 84; *Zurick v Inman*, 221 Tenn 393, 426 SW2d 767; *Mooney v Denver & R. G. W. R.R.*, 118 Utah 307, 221 P2d 628.

Footnote 20. *Missouri ex rel. Southern R. Co. v Mayfield*, 340 US 1, 95 L Ed 3, 71 S Ct 1; *Price v Atchison, T. & S. F. R. Co.*, 42 Cal 2d 577, 268 P2d 457, 43 ALR2d 756, cert den 348 US 839, 99 L Ed 661, 75 S Ct 44; *Johnson v Chicago, B. & Q. R. Co.*, 243 Minn 58, 66 NW2d 763; *St. Louis S. F. R. Co. v Superior Court Creek County (Okla)* 276 P2d 773, supp op (Okla) 290 P2d 118.

---

## § 146 Status of plaintiff as citizen of foreign nation

[View Entire Section](#)  
[Go to Parallel Reference Table](#)  
[Go to Supplement](#)

Although the doctrine of forum non conveniens is generally inapplicable where an American plaintiff chooses his home state as the forum for litigation, 21 it has been held that a plaintiff's choice deserves less deference where the plaintiff is a citizen of a foreign nation. 22

---

## § 146 ----Status of plaintiff as citizen of foreign nation [SUPPLEMENT]

### Case authorities:

The trial court did not err in dismissing plaintiff's equitable distribution action for lack of personal jurisdiction over defendant where the evidence tended to show that defendant had been a resident of New Jersey for over twenty years; she had been in North Carolina on only two occasions for a total of ten days; plaintiff left the marital home in New Jersey, bought property, built a house in North Carolina and had it titled in both parties' names, all without defendant's agreement or acquiescence; and plaintiff thus failed to

show the necessary minimum contacts to give North Carolina personal jurisdiction over defendant. *Shamley v Shamley* (1994) 117 NC App 175.

---

## Footnotes

Footnote 21. § 142.

Footnote 22. *Piper Aircraft Co. v Reyno*, 454 US 235, 70 L Ed 2d 419, 102 S Ct 252, reh den 455 US 928, 71 L Ed 2d 474, 102 S Ct 1296 and (not followed on other grounds by *Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 478 NYS2d 597, 467 NE2d 245, 57 ALR4th 955) and (not followed on other grounds by *Myers v Boeing Co.*, 115 Wash 2d 123, 794 P2d 1272).

But see *Myers v Boeing Co.*, 115 Wash 2d 123, 794 P2d 1272 (rejecting the *Piper Aircraft* holding as not binding on a state court).

---

## IX. JUDICIAL PRECEDENTS AS BINDING OR PERSUASIVE [147-178]

### A. Stare Decisis [147-165]

#### Research References

ALR Digest: Courts §§ 349-364.5

ALR Index: Precedents

### 1. In General [147-151]

---

#### § 147 Generally

[View Entire Section](#)  
[Go to Parallel Reference Table](#)  
[Go to Supplement](#)

Under the doctrine of stare decisis, when a court has laid down a principle of law as applying to a certain set of facts, it will adhere to that principle and apply it to all future cases where the facts are substantially the same. <sup>23</sup> The rule of stare decisis is a judicial policy, <sup>24</sup> based on the principle that, absent powerful countervailing considerations, like cases should be decided alike, <sup>25</sup> in order to maintain stability and continuity in the law <sup>26</sup> and to insure that the judicial branch will not itself be above the law. <sup>27</sup>

Particularly where a precedent or series of precedents has been treated as authoritative for a long time, courts are generally reticent to deviate from that policy, <sup>28</sup> even if they



would rule otherwise if the question were one of first impression. 29

---

## § 147 ----Generally [SUPPLEMENT]

### Case authorities:

Fact that Congress has referred contractual matter to court for factfinding does not sweep aside substantial case law that court and its predecessors have developed both with respect to how court is to discharge its task to interpret contracts and what legal consequences flow from certain contractual provisions. *Inslaw, Inc. v United States* (1996) 35 Fed Cl 295.

Rule stare decisis involves the court's choice of the applicable legal standard or test, while stare decisis is the result reached by applying that legal standard to the particular facts of the case. *Butterworth v National League of Professional Baseball Clubs* (1994, Fla) 644 So 2d 1021, 19 FLW S 499, 1994-2 CCH Trade Cases ¶ 70737.

The doctrine of stare decisis serves the important purpose of providing stability to the law and to the society governed by that law. *State v Gray* (1995, Fla) 654 So 2d 552, 20 FLW S 204.

In all cases in which the issue under consideration previously has been addressed in an opinion, that opinion should be followed unless there are urgent and compelling reasons to overrule that precedent. *McGlothlin v State* (1995, Tex Crim) 896 SW2d 183.

---

### Footnotes

Footnote 23. *T. S. Faulk & Co. v Boutwell*, 242 Ala 526, 7 So 2d 490; *Whitaker v Mitchell Mfg. Co.*, 219 Ark 779, 244 SW2d 965; *Trustees of New Castle Common v Gordy* (Sup) 33 Del Ch 334, 93 A2d 509, 40 ALR2d 544; *Humthlett v Reeves*, 211 Ga 210, 85 SE2d 25; *Scott v Gossett*, 66 Idaho 329, 158 P2d 804; *Nash Engineering Co. v Marcy Realty Corp.*, 222 Ind 396, 54 NE2d 263; *State v Mileff* (Ind App) 520 NE2d 123; *Ballard County v Kentucky County Debt Com.*, 290 Ky 770, 162 SW2d 771; *Brewer's Dairy v Dolloff* (Me) 268 A2d 636; *Paulich v Republic Coal Co.*, 110 Mont 174, 102 P2d 4; *Haskins v Dube*, 101 NH 224, 138 A2d 677, 71 ALR2d 1412; *Williams v Union County Hospital Ass'n*, 237 NC 395, 75 SE2d 308; *Colby v Hayes*, 186 Okla 283, 97 P2d 65; *Swilley v McCain* (Tex) 374 SW2d 871, reh'g of cause overr (Feb 19, 1964); *Snidow v Snidow*, 192 Va 60, 63 SE2d 620, 25 ALR2d 326; *Fornili v Auto Mechanics' Union*, 200 Wash 283, 93 P2d 422, 5 BNA LRRM 976, 1 CCH LC ¶ 18456; *Sherwood v Carter*, 805 P2d 452 (Idaho 1991).

Footnote 24. *Muller v Nebraska Methodist Hospital*, 160 Neb 279, 70 NW2d 86 (ovrld in part on other grounds by *Myers v Drozda*, 180 Neb 183, 141 NW2d 852); *Adkins v St. Francis Hosp.*, 149 W Va 705, 143 SE2d 154.

Adherence to stare decisis is of paramount importance. *Barnes v Walker*, 191 Tenn 364, 234 SW2d 648.

**Law Reviews:** Aldisert, Precedent: What it is and what it isn't; when do we kiss it and



when do we kill it? 17 Pepp LR 605, 1990.

Footnote 25. Schilling v Schoenle (Ky) 782 SW2d 630; State ex rel. Moore v Molpus (Miss) 578 So 2d 624; Cenven, Inc. v Bethlehem Steel Corp., 41 NY2d 842, 393 NYS2d 700, 362 NE2d 251.

The supreme court will strongly presume the validity of its prior decisions and will uphold those decisions as a matter of public policy, unless great injury or injustice would result. Independence Federal Bank, F.S.B. v Paine Webber, 302 Ark 324, 789 SW2d 725.

Footnote 26. White v Bateman, 89 Ariz 110, 358 P2d 712; Trailer Convoys, Inc. v Hosclaw (Ky) 419 SW2d 563 (ovrld in part on other grounds by Hudson v Owens (Ky) 439 SW2d 565); Lee v Consolidated Edison Co., 98 Misc 2d 304, 413 NYS2d 826; Williams v Union County Hospital Ass'n, 237 NC 395, 75 SE2d 308.

Footnote 27. Samsel v Wheeler Transp. Servs., 246 Kan 336, 789 P2d 541 (criticized on other grounds by Bair v Peck, 248 Kan 824, 811 P2d 1176) and (ovrld on other grounds as stated in McKissick v Frye, 255 Kan 566, 876 P2d 1371).

The doctrine of stare decisis permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact; further, while stare decisis is not an inexorable command, any detours from the straight path of stare decisis have occurred for articulable reasons, and only when the court has felt obliged to bring its opinions into agreement with experience and with facts newly ascertained. Vasquez v Hillery, 474 US 254, 88 L Ed 2d 598, 106 S Ct 617.

Footnote 28. Oklahoma County v Queen City Lodge, I. O. O. F., 195 Okla 131, 156 P2d 340; Keltner v Washington County, 310 Or 499, 800 P2d 752.

Footnote 29. Oklahoma County v Queen City Lodge, I. O. O. F., 195 Okla 131, 156 P2d 340.

---

## § 148 Res judicata and law of the case distinguished

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

The doctrine of res judicata, which rests on a different principle from stare decisis, 30 provides that when a court of competent jurisdiction renders a final judgment on the merits without fraud or collusion, that judgment is conclusive of the causes of action and of the facts or issues litigated in it as to the parties and their privies in all other actions in the same or other judicial tribunals of concurrent jurisdiction. 31 In contrast, stare decisis applies even where different parties are involved in the later case, in which a prior decision is invoked as a precedent, than were involved in the case in which the precedent was established. 32 Also, stare decisis is based on the legal principle or rule involved in a prior case, and not on the judgment which resulted from that case. 33 Moreover, while under res judicata even an erroneous judgment is binding, 34 under stare decisis a

court may refuse to follow an erroneous decision. 35

Stare decisis is also distinguishable from the doctrine of the "law of the case," 36 which provides that when an appellate court has passed on a legal question and remanded the cause to the court below for further proceedings, the legal questions it determined will not be differently determined on a subsequent appeal in the same case. 37

---

### Footnotes

Footnote 30. Scott v Gossett, 66 Idaho 329, 158 P2d 804; Payne v Covington, 276 Ky 380, 123 SW2d 1045, 122 ALR 321; Winston Bros. Co. v Galloway, 168 Or 109, 121 P2d 457.

Footnote 31. 46 Am Jur 2d, Judgments § 514.

Footnote 32. In re Burt's Estate, 353 Pa 217, 44 A2d 670, 162 ALR 1053; Snidow v Snidow, 192 Va 60, 63 SE2d 620, 25 ALR2d 326.

Footnote 33. Scott v Gossett, 66 Idaho 329, 158 P2d 804.

Footnote 34. 46 Am Jur 2d, Judgments § 565.

Footnote 35. § 150.

Footnote 36. Union Light, Heat & Power Co. v Blackwell's Adm'r (Ky) 291 SW2d 539, 87 ALR2d 264, appeal after remand (Ky) 341 SW2d 261; Payne v Covington, 276 Ky 380, 123 SW2d 1045, 122 ALR 321.

Footnote 37. 5 Am Jur 2d, Appeal and Error § 744.

---

## § 149 Deviations from precedents

|  |
|--|
| <p><a href="#">View Entire Section</a><br/><a href="#">Go to Parallel Reference Table</a><br/><a href="#">Go to Supplement</a></p> |
|--|

Precedents are not to be overruled lightly, 38 especially where the precedent has been followed for a long period of years. 39 Therefore, unless some necessity arises in the case before it, the court will not reconsider earlier decisions. 40 However, the principle of stare decisis is not a binding legal rule to be blindly followed, 41 and a court may overrule precedent after reviewing the plausibility of the existing interpretation of a statute, the extent to which that interpretation has been fixed in the fabric of the law, the strength of arguments for changing the interpretation, 42 and the relative ease or difficulty of modification or change in the precedent. In addition, invitations to judicial reconsideration carry more weight when addressed to constitutional issues because of the very great difficulty of effecting change by constitutional amendment; by contrast, the courts show greater restraint in stepping in to undertake correction of what may be

perceived as erroneous determinations with respect to questions arising under legislative enactment. 43

The determination as to whether a precedent should be overruled is within the court's discretion. 44

---

## **§ 149 ----Deviations from precedents [SUPPLEMENT]**

### **Case authorities:**

Stare decisis does not command blind allegiance to precedent. *State v Gray* (1995, Fla) 654 So 2d 552, 20 FLW S 204.

---

### **Footnotes**

Footnote 38. *Wilmington Housing Authority v Fidelity & Deposit Co.* (Sup) 43 Del 381, 47 A2d 524, 170 ALR 1288; *Scott v Gossett*, 66 Idaho 329, 158 P2d 804; *Kotschevar v North Fork Tp.*, 229 Minn 234, 39 NW2d 107; *Muller v Nebraska Methodist Hospital*, 160 Neb 279, 70 NW2d 86 (ovrld in part on other grounds by *Myers v Drozda*, 180 Neb 183, 141 NW2d 852); *Stocks v Stocks*, 64 Nev 431, 183 P2d 617; *Williams v Union County Hospital Ass'n*, 237 NC 395, 75 SE2d 308.

Footnote 39. *Missouri v Ross*, 299 US 72, 81 L Ed 46, 57 S Ct 60; *McGrath Bldg. Co. v Bettendorf*, 248 Iowa 1386, 85 NW2d 616, 68 ALR2d 1429; *State v Hamm* (Minn) 423 NW2d 379; *In re Burt's Estate*, 353 Pa 217, 44 A2d 670, 162 ALR 1053.

Footnote 40. *Ozyck v D'Atri*, 206 Conn 473, 538 A2d 697.

An appellate court should follow established precedent unless there exists a compelling and urgent reason not to do so which destroys or completely overshadows the policy or purpose which the precedent established. *Schilling v Schoenle* (Ky) 782 SW2d 630.

Although the state supreme court is always willing to reconsider its settled precedent if circumstances warrant, it ordinarily will not reconsider that precedent in certified cases. *Western Helicopter Services, Inc., v Rogerson Aircraft Corp.*, 311 Or 361, 811 P2d 627.

Footnote 41. *White v Bateman*, 89 Ariz 110, 358 P2d 712; *County of Los Angeles v Faus*, 48 Cal 2d 672, 312 P2d 680; *Molitor v Kaneland Community Unit Dist.*, 18 Ill 2d 11, 163 NE2d 89, 86 ALR2d 469, cert den 362 US 968, 4 L Ed 2d 900, 80 S Ct 955 and supp op 24 Ill 2d 467, 182 NE2d 145 and (superseded by statute on other grounds as stated in *Oppe v State* (4th Dist) 171 Ill App 3d 491, 121 Ill Dec 882, 525 NE2d 1189) and (superseded by statute on other grounds as stated in *Burdinie v Glendale Heights*, 139 Ill 2d 501, 152 Ill Dec 121, 565 NE2d 654) and (superseded by statute on other grounds as stated in *Kennell v Clayton Township* (4th Dist) 239 Ill App 3d 634, 179 Ill Dec 980, 606 NE2d 812); *Daniel's Adm'r v Hoofnel*, 287 Ky 834, 155 SW2d 469; *Burlew v Fidelity & Casualty Co.*, 276 Ky 132, 122 SW2d 990, 121 ALR 751; *Kabatchnick v Hanover-Elm Bldg. Corp.*, 328 Mass 341, 103 NE2d 692, 30 ALR2d 918, appeal after remand 331 Mass 366, 119 NE2d 169; *Kotschevar v North Fork Tp.*, 229 Minn 234, 39 NW2d 107; *Woods v Lancet*, 303 NY 349, 102 NE2d 691, 27 ALR2d 1250; *Oklahoma*

County v Queen City Lodge, I. O. O. F., 195 Okla 131, 156 P2d 340; Hungerford v Portland Sanitarium & Benevolent Asso., 235 Or 412, 384 P2d 1009; Sherwood v Carter, 805 P2d 452 (Idaho 1991).

Precedent may be overruled where necessary in the interest of justice. Union Light, Heat & Power Co. v Blackwell's Adm'r (Ky) 291 SW2d 539, 87 ALR2d 264, appeal after remand (Ky) 341 SW2d 261; Barnes v Walker, 191 Tenn 364, 234 SW2d 648; Humthlett v Reeves, 211 Ga 210, 85 SE2d 25.

Footnote 42. Hackford v Utah Power & Light Co. (Utah) 740 P2d 1281, 59 Utah Adv Rep 21.

Footnote 43. Higby v Mahoney, 48 NY2d 15, 421 NYS2d 35, 396 NE2d 183.

Footnote 44. County of Los Angeles v Faus, 48 Cal 2d 672, 312 P2d 680; Warburton v Warkentin, 185 Kan 468, 345 P2d 992, 79 ALR2d 1114; Hanks v McDanell, 307 Ky 243, 210 SW2d 784, 17 ALR2d 1; Naftalin v King, 257 Minn 498, 102 NW2d 301; Otter Tail Power Co. v Von Bank, 72 ND 497, 8 NW2d 599, 145 ALR 1343; Safeway Stores, Inc. v State Bd. of Agriculture, 198 Or 43, 255 P2d 564.

---

## § 150 --Grounds for deviation

[View Entire Section](#)  
[Go to Parallel Reference Table](#)  
[Go to Supplement](#)

A court may deviate from a precedent on grounds of—

—obvious error in the precedent. 45

—the unreasonableness of the principle of law established by the precedent. 46

—changes in conditions resulting in the disappearance of the rule the precedent established. 47

—the likelihood that adherence to precedent would cause greater harm to the community than could possibly result from disregarding stare decisis in a particular case. 48

—inconsistency between the precedent and a constitutional provision. 49

However, even if the earlier precedent was wrongfully decided, the court will not overrule the precedent where any adverse or harmful effects have been limited, 50 or where it has remained standing for significant period and many have relied on it, such as in the case of a rule of property. 51 In such a case, substantial justice may often be better promoted by adhering to an erroneous decision than by overthrowing a rule once established. 52 Therefore, before the court will overrule a decision deliberately made, it should be convinced not merely that the case was wrongfully decided, but also that less injury will result from overruling than from following it. 53

The mere fact that the composition of a court has changed since it made a previous decision or ruling is not ground for deviating from the precedent set by that previous decision. 54

---

## **§ 150 --Grounds for deviation [SUPPLEMENT]**

### **Case authorities:**

Perpetrating an error in legal thinking under the guise of stare decisis serves no one well and only undermines the integrity and credibility of the court. *State v Gray* (1995, Fla) 654 So 2d 552, 20 FLW S 204.

---

### **Footnotes**

Footnote 45. *People v Anderson*, 43 Cal 3d 1104, 240 Cal Rptr 585, 742 P2d 1306 (criticized on other grounds as stated in *People v Davis*, 7 Cal 4th 797, 30 Cal Rptr 2d 50, 872 P2d 591, 94 CDOS 3517, 94 Daily Journal DAR 6630); *Morgenthau v First Atlantic Nat'l Bank* (Fla) 80 So 2d 446, 54 ALR2d 353; *Davis v Penn Mut. Life Ins. Co.*, 198 Ga 550, 32 SE2d 180, 160 ALR 778, cert den 331 US 829, 91 L Ed 1844, 67 S Ct 1353 and subsequent app 201 Ga 821, 41 SE2d 406; *Molitor v Kaneland Community Unit Dist.*, 18 Ill 2d 11, 163 NE2d 89, 86 ALR2d 469, cert den 362 US 968, 4 L Ed 2d 900, 80 S Ct 955 and supp op 24 Ill 2d 467, 182 NE2d 145 and (superseded by statute on other grounds as stated in *Oppe v State* (4th Dist) 171 Ill App 3d 491, 121 Ill Dec 882, 525 NE2d 1189) and (superseded by statute on other grounds as stated in *Burdin v Glendale Heights*, 139 Ill 2d 501, 152 Ill Dec 121, 565 NE2d 654) and (superseded by statute on other grounds as stated in *Kennell v Clayton Township* (4th Dist) 239 Ill App 3d 634, 179 Ill Dec 980, 606 NE2d 812); *Gosek v Garmer & Stiles Co.* (Iowa) 158 NW2d 731; *State v Ballance*, 229 NC 764, 51 SE2d 731, 7 ALR2d 407; *Carter-Jones Lumber Co. v Eblen*, 167 Ohio St 189, 4 Ohio Ops 2d 256, 147 NE2d 486, 68 ALR2d 285; *Travelers Fire Ins. Co. v Wright* (Okla) 322 P2d 417, 70 ALR2d 1170; *G.L. v Kaiser Foundation Hospitals, Inc.*, 306 Or 54, 757 P2d 1347; *Noonan v Portland*, 161 Or 213, 88 P2d 808; *Barnes v Walker*, 191 Tenn 364, 234 SW2d 648; *Thomas v Meyer* (Tex Civ App) 168 SW2d 681; *Austad v Austad*, 2 Utah 2d 49, 269 P2d 284, 48 ALR2d 256; *Snidow v Snidow*, 192 Va 60, 63 SE2d 620, 25 ALR2d 326.

Footnote 46. *Mason v American Emery Wheel Works* (CA1 RI) 241 F2d 906, cert den 335 US 715, 2 L Ed 2d 32, 78 S Ct 17; *Cottrell v Amerkan*, 160 Fla 390, 35 So 2d 383; *Dini v Naiditch*, 20 Ill 2d 406, 170 NE2d 881, 86 ALR2d 1184; *Haney v Lexington* (Ky) 386 SW2d 738, 10 ALR3d 1362; *Woods v Lancet*, 303 NY 349, 102 NE2d 691, 27 ALR2d 1250; *Oklahoma County v Queen City Lodge, I. O. O. F.*, 195 Okla 131, 156 P2d 340.

Footnote 47. *Dini v Naiditch*, 20 Ill 2d 406, 170 NE2d 881, 86 ALR2d 1184; *Farmers' Bank & Trust Co.'s Receiver v Brown*, 249 Ky 820, 61 SW2d 628, 91 ALR 323; *Frederick v Brown Funeral Homes, Inc.*, 222 La 57, 62 So 2d 100, 39 ALR2d 986; *McAndrew v Mularchuk*, 33 NJ 172, 162 A2d 820, 88 ALR2d 1313; *G.L. v Kaiser Foundation Hospitals, Inc.*, 306 Or 54, 757 P2d 1347; *Hungerford v Portland Sanitarium & Benevolent Asso.*, 235 Or 412, 384 P2d 1009.

Footnote 48. *Bristor v Cheatham*, 73 Ariz 228, 240 P2d 185, revd on other grounds 75 Ariz 227, 255 P2d 173 and (ovrld on other grounds as stated in *Jarvis v State Land Dep't*, 104 Ariz 527, 456 P2d 385) and (superseded by statute on other grounds as stated in *Chino Valley v Prescott*, 131 Ariz 78, 638 P2d 1324); *State ex rel. Moore v Molpus* (Miss) 578 So 2d 624.

Footnote 49. *Pennsylvania-Reading Seashore Lines v Board of Public Utility Comm'rs*, 5 NJ 114, 74 A2d 265, cert den 340 US 876, 95 L Ed 637, 71 S Ct 122; *Carter-Jones Lumber Co. v Eblen*, 167 Ohio St 189, 4 Ohio Ops 2d 256, 147 NE2d 486, 68 ALR2d 285.

Footnote 50. *State ex rel. Moore v Molpus* (Miss) 578 So 2d 624.

Footnote 51. *Las Vegas v Oman* (App) 796 P2d 1121, cert den 110 NM 282, 795 P2d 87 and appeal after remand on other grounds, remanded sub nom *State ex rel. Martinez v City of Las Vegas* (App) 118 NM 257, 880 P2d 868, cert gr (NM) 1994 NM LEXIS 315.

Footnote 52. *Ballard County v Kentucky County Debt Com.*, 290 Ky 770, 162 SW2d 771.

Footnote 53. *State v Dunlop* (Alaska) 721 P2d 604, reported at (Alaska) 723 P2d 70, withdrawn by publisher, reported at, amd (Alaska) 721 P2d 604; *Samsel v Wheeler Transp. Servs.*, 246 Kan 336, 789 P2d 541 (criticized on other grounds by *Bair v Peck*, 248 Kan 824, 811 P2d 1176) and (ovrld on other grounds as stated in *McKissick v Frye*, 255 Kan 566, 876 P2d 1371).

Footnote 54. *State ex rel. Phillips v Carter*, 186 Okla 571, 99 P2d 1025.

---

## § 151 Application of doctrine in criminal cases

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

Courts have applied the doctrine of stare decisis in criminal proceedings both in favor of the defendant <sup>55</sup> and the prosecution. <sup>56</sup> Courts have also refused to apply the doctrine. <sup>57</sup>

---

### Footnotes

Footnote 55. *Johnson v State* (Fla) 91 So 2d 185.

Footnote 56. *Crow v State*, 147 Tex Crim 292, 180 SW2d 354.

Footnote 57. *State v Mellenberger*, 163 Or 233, 95 P2d 709, 128 ALR 1506; *Blake v State*, 147 Tex Crim 333, 180 SW2d 351.

The court overruled a decision which had upheld a statute which allowed municipalities with municipal courts to impose greater penalties for municipal ordinance violations than those municipalities without municipal courts. *Aberdeen v Meidinger*, 89 SD 412, 233 NW2d 331.

As to the effect of overruling precedents in criminal cases, see §§ 177.

## 2. Prerequisites for Operation of Doctrine [152-155]

---

### § 152 Generally; judicial opinion

[View Entire Section](#)  
[Go to Parallel Reference Table](#)  
[Go to Supplement](#)

For a court to apply a precedent as stare decisis, there must have been a judicial opinion on a point of law. 58 Based on this standard, the following have no stare decisis effect:

- Nonfinal decisions 59
  - Advisory opinions 60
  - Affirmations by a higher court of a lower court decision without an opinion on the legal point in question 61
  - Refusals by a higher court to review a lower court decision, without an opinion on the legal point in question 62
  - Master's reports not acted upon by the court appointing the master 63
  - Attorney general opinions 64
  - Recommendations of a criminal jury instructions committee 65
  - Assertions of facts found in the parties' briefs but not included in the text of the reported case 66
- ♦ Observation: Although the interpretation of a statute by an administrative agency has no stare decisis effect, 67 courts will generally show great deference to an agency's interpretation of a statute. 68

---

### § 152 ----Generally; judicial opinion [SUPPLEMENT]

#### Case authorities:

One judge's suppression of cocaine found in the luggage of a defendant charged with



trafficking in cocaine on the ground that officers made an unconstitutional stop of the vehicle in which he was riding did not preclude a second judge's ruling, made after defendant was reindicted for conspiracy to traffic cocaine, that cocaine found in a coconspirator's luggage during the same stop was admissible in defendant's conspiracy trial, since the second judge was asked to rule on an entirely new and different matter, and he did not change or overrule the first judge's order. *State v Smith* (1995) 117 NC App 671, 452 SE2d 827.

---

## Footnotes

Footnote 58. *Van Alst v Kansas City* (Mo App) 186 SW2d 762; *Rush v Chattanooga Du Pont Employees' Credit Union*, 210 Tenn 344, 358 SW2d 333.

*Stare decisis* is a deliberate or solemn decision of a court or judge made after argument on a question of law, fairly arising in a case and necessary to its determination. *State v Valmont Plantations* (Tex Civ App San Antonio) 346 SW2d 853, writ granted (Tex) 5 Tex Sup Ct Jour 131 and aff'd 163 Tex 381, 355 SW2d 502, dissenting op at (Tex) 5 Tex Sup Ct Jour 276 and reh'g of cause overr (Apr 11, 1962) and (superseded by statute on other grounds as stated in *Lower Colorado River Authority v Texas Dep't of Water Resources* (Tex App Austin) 638 SW2d 557).

Footnote 59. *Newberry v St. Louis*, 234 Mo App 104, 109 SW2d 876.

Footnote 60. Opinion of Justices, 157 Me 152, 170 A2d 652; *Bowe v Secretary of Commonwealth*, 320 Mass 230, 69 NE2d 115, 11 CCH LC ¶ 63384, 167 ALR 1447; *Torigian v Saunders*, 77 SD 610, 97 NW2d 586.

Footnote 61. *Shropshire v Commerce Farm Credit Co.*, 120 Tex 400, 30 SW2d 282, 84 ALR 1269, reh den 120 Tex 412, 39 SW2d 11, 84 ALR 1278, cert den 284 US 675, 76 L Ed 571, 52 S Ct 130.

Footnote 62. *People v Gravenhorst* (Sp Sess) 32 NYS2d 760; *Shropshire v Commerce Farm Credit Co.*, 120 Tex 400, 30 SW2d 282, 84 ALR 1269, reh den 120 Tex 412, 39 SW2d 11, 84 ALR 1278, cert den 284 US 675, 76 L Ed 571, 52 S Ct 130.

Footnote 63. *Public Serv. Co. v New Hampton*, 101 NH 142, 136 A2d 591.

Footnote 64. *Prescott v Chino Valley*, 166 Ariz 480, 803 P2d 891, 76 Ariz Adv Rep 3; *Cormier v Lafayette Parish School Bd.* (La App 3d Cir) 508 So 2d 207; *Ludington & N. Ry. v Epworth Assembly*, 188 Mich App 25, 468 NW2d 884, app den 439 Mich 934, 480 NW2d 101, reconsideration den (Mich) 483 NW2d 897; *Billigmeier v County of Hennepin* (Minn) 428 NW2d 79; *Higgins v Director of Revenue* (Mo App) 778 SW2d 24; *Green Bay Educ. Ass'n v Department of Public Instruction* (App) 154 Wis 2d 655, 453 NW2d 915.

As to the persuasive character of the opinions of an attorney general, see 7 Am Jur 2d, Attorney General § 11.

Footnote 65. *State v Villarreal* (App) 153 Wis 2d 323, 450 NW2d 519 (criticized on other grounds by *Wisconsin v Sonibare* (Wis App) 1991 Wisc App LEXIS 1130).



Footnote 66. *Chan v W-East Trading Corp.*, 199 Ga App 76, 403 SE2d 840, 102-51 Fulton County D R 8B, reh den (Ga App) 102-70 Fulton County D R 12B and cert den (Ga) 1991 Ga LEXIS 695.

Footnote 67. *Howard Pore, Inc. v Nims*, 322 Mich 49, 33 NW2d 657, 4 ALR2d 1041; *In re Abbott's Estate*, 213 Minn 289, 6 NW2d 466.

Footnote 68. 2 Am Jur 2d, Administrative Law § 524.

---

## § 153 Decision on legal point

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

For a case to be stare decisis on a particular point of law, that issue must have been raised in the action 69 decided by the court, 70 and its decision made part of the opinion of the case; accordingly, a case is not binding precedent on a point of law where the holding is only implicit or assumed in the decision but is not announced. 71

---

## Footnotes

Footnote 69. *Old Colony Trust Co. v Commissioner of Corps. & Taxation*, 346 Mass 667, 195 NE2d 332, 13 ALR3d 646; *Chapman v Dorsey*, 230 Minn 279, 41 NW2d 438, 16 ALR2d 1015.

Footnote 70. *People v Olah*, 300 NY 96, 89 NE2d 329, 19 ALR2d 219; *Puthoff v Owens-Illinois Glass Co. (App, Hamilton Co)* 18 Ohio Ops 282, 30 Ohio L Abs 653, 31 NE2d 684; *State v J. M. Huber Corp. (Tex Civ App)* 193 SW2d 882, affd 145 Tex 517, 199 SW2d 501; *Continental Mut. Sav. Bank v Elliott*, 166 Wash 283, 6 P2d 638, 81 ALR 1005.

Footnote 71. *Floyd v Christian Church Widows & Orphans Home*, 296 Ky 196, 176 SW2d 125, 151 ALR 1230; *In re Keenan*, 310 Mass 166, 37 NE2d 516, 137 ALR 766; *People v Heflin*, 434 Mich 482, 456 NW2d 10, reh den 435 Mich 1204 and reh den (Mich) 1990 Mich LEXIS 1577; *Puthoff v Owens-Illinois Glass Co. (App, Hamilton Co)* 18 Ohio Ops 282, 30 Ohio L Abs 653, 31 NE2d 684; *In re Elliott's Estate*, 22 Wash 2d 334, 156 P2d 427, 157 ALR 1335.

---

## § 154 --Effect of dicta

[View Entire Section](#)

Generally, the parts of an opinion of a court which are mere dicta have no stare decisis effect. 72

Where the opinion accompanying a decision invoked as a precedent states several reasons for the decision, although a single reason would have been sufficient to support the holding reached, none of the reasons indicated is to be considered as a mere dictum; rather, each is to be treated as a precedent embraced by stare decisis. 73

Some courts, however, have given dicta stare decisis force, 74 particularly where the dicta consists of judicial instructions to lower courts. 75

---

## Footnotes

Footnote 72. *Gray v Reynolds* (Ala) 553 So 2d 79, reh den (Ala) 1989 Ala LEXIS 794; *People v Superior Court (Williams)* (3rd Dist) 8 Cal App 4th 688, 10 Cal Rptr 2d 873, 92 CDOS 6750, 92 Daily Journal DAR 10736, reh den (Cal App 3rd Dist) 92 CDOS 7448, 92 Daily Journal DAR 12034 and review den (Cal) 1992 Cal LEXIS 5571; *United States v Jesse* (Colo) 744 P2d 491, 18 ELR 20275; *Pooton v Berutich* (Fla App D2) 199 So 2d 139; *Koske v Townsend Engineering Co. (Ind)* 551 NE2d 437, CCH Prod Liab Rep ¶ 12406; *State v Martin*, 243 Iowa 1323, 55 NW2d 258, 34 ALR2d 904; *State ex rel. Kairuz v Romines* (Mo App) 806 SW2d 451; *Stanley v A. Levy & J. Zentner Co.*, 60 Nev 432, 112 P2d 1047, 158 ALR 76; *People v Rosano* (2d Dept) 69 App Div 2d 643, 419 NYS2d 543, affd 50 NY2d 1013, 431 NYS2d 683, 409 NE2d 1357; *Kemp v Matthews* (App, Cuyahoga Co) 89 Ohio L Abs 524, 183 NE2d 259, 98 ALR2d 837; *Tillinghast v Maggs*, 82 RI 478, 111 A2d 713, 52 ALR2d 1004; *Ex parte Goodyear Tire & Rubber Co.*, 248 SC 412, 150 SE2d 525; *Shepherd Fleets, Inc. v Opryland USA, Inc. (Tenn App)* 759 SW2d 914; *Kelly v Carroll*, 36 Wash 2d 482, 219 P2d 79, 19 ALR2d 1174, cert den 340 US 892, 95 L Ed 646, 71 S Ct 208; *Witt v Witt*, 271 Wis 93, 72 NW2d 748, 52 ALR2d 1158.

For a definition of dicta, see § 39.

Footnote 73. *Dooly v Gates*, 194 Ga 787, 22 SE2d 730; *In re Finch's Estate*, 239 Iowa 1069, 32 NW2d 819, 3 ALR2d 1403; *Stensvad v Ottman*, 123 Mont 158, 208 P2d 507; *Hayes v Wilmington*, 243 NC 525, 91 SE2d 673; *Woodard v Pacific Fruit & Produce Co.*, 165 Or 250, 106 P2d 1043, 131 ALR 832; *Stormo v Dell Rapids*, 75 SD 582, 70 NW2d 831, 51 ALR2d 1123.

Footnote 74. *Brown v Commissioner of Correction*, 336 Mass 718, 147 NE2d 782, 68 ALR2d 708; *Winter v Hardester*, 232 Miss 200, 98 So 2d 629, 71 ALR2d 982; *Valmont Plantations v State*, 163 Tex 381, 355 SW2d 502, dissenting op at (Tex) 5 Tex Sup Ct Jour 276 and reh'g of cause overr (Apr 11, 1962) and (superseded by statute on other grounds as stated in *Lower Colorado River Authority v Texas Dep't of Water Resources* (Tex App Austin) 638 SW2d 557).

Footnote 75. *Ex parte Harrison* (Tex App Austin) 741 SW2d 607; *State v Koput*, 142 Wis 2d 370, 418 NW2d 804.

---

## § 155 Identity of issues

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

A decision has a stare decisis effect with regard to a later case only if the legal point on which the decision in both cases rests is the same, 76 or substantially the same. 77 To determine whether the questions are identical or substantially so, the court must consider the prior decision in the context of the facts and issues in existence at the time the decision was rendered. 78 Generally, where the facts between the present case and that to be applied as stare decisis are essentially different, stare decisis does not apply. 79 However, there is also authority for the view that in the consideration of precedents, courts do not look so much for identity of facts as for statements of applicable principles, 80 and that a conclusion of the court may be supported by earlier cases, although the fact situations may not be the same. 81

---

### Footnotes

Footnote 76. *Usen v Usen*, 136 Me 480, 13 A2d 738, 128 ALR 1449; *Safeway Stores, Inc. v State Bd. of Agriculture*, 198 Or 43, 255 P2d 564; *State ex rel. Lea v Brown*, 166 Tenn 669, 64 SW2d 841, 91 ALR 1246, cert den 292 US 638, 78 L Ed 1491, 54 S Ct 717.

Footnote 77. *State v J. M. Huber Corp. (Tex Civ App)* 193 SW2d 882, affd 145 Tex 517, 199 SW2d 501.

Cases involving the question of *Moore v Freeman*, 58 NM 139, 266 P2d 674, 41 ALR2d 1388; *Wiggins v Capital Transit Co. (Mun Ct App Dist Col)* 122 A2d 117, 57 ALR2d 1; *Harris v Oro-Dam Constructors (3rd Dist)* 269 Cal App 2d 911, 75 Cal Rptr 544, 34 Cal Comp Cas 684.

Footnote 78. *Metropolitan Life Ins. Co. v Korneghy*, 37 Ala App 497, 71 So 2d 292, 68 ALR2d 239, cert dismd 260 Ala 521, 71 So 2d 301; *Dade County v Brigham (Fla)* 47 So 2d 602, 18 ALR2d 1221; *Nix v Smith*, 32 Ill 2d 465, 207 NE2d 460; *Fisher v Pendleton*, 184 Kan 322, 336 P2d 472, 74 ALR2d 1274; *State Street Trust Co. v Hall*, 311 Mass 299, 41 NE2d 30, 156 ALR 13; *Howard Pore, Inc. v Nims*, 322 Mich 49, 33 NW2d 657, 4 ALR2d 1041; *In re Liberman*, 279 NY 458, 18 NE2d 658, 122 ALR 1; *In re Will of Pridgen*, 249 NC 509, 107 SE2d 160, 75 ALR2d 312; *In re Frazier's Estate*, 180 Or 232, 177 P2d 254, 170 ALR 729.

Footnote 79. *Ward v Baskin (Fla)* 94 So 2d 859, 66 ALR2d 1320; *Lee v Insurance Co. of N. Am.*, 70 Hawaii 120, 763 P2d 567; *Grover v Simons*, 342 Mich 480, 70 NW2d 775, 66 ALR2d 325; *In re Peterson's Estate*, 230 Minn 478, 42 NW2d 59, 18 ALR2d 910; *Caddo Electric Cooperative v Bollinger (Okla)* 285 P2d 200, 55 ALR2d 172.

Decisions relating to tax descriptions are not controlling where the sufficiency of a

description in a deed between private parties is in issue, for the courts are not inclined to insist on that accuracy of description in deeds between private parties which is required in sheriff's deeds or other conveyances in invitum. *Arbogast v Pilot Rock Lumber Co.*, 215 Or 579, 336 P2d 329, 72 ALR2d 712.

Footnote 80. *American Mut. Liability Ins. Co. v Duesenberg*, 214 Ind 488, 14 NE2d 919, 117 ALR 1293, reh den 214 Ind 495, 16 NE2d 698, 117 ALR 1297.

Footnote 81. *Gammage v Weinberg* (Tex Civ App Houston (1st Dist)) 355 SW2d 788, 95 ALR2d 1086, writ ref n r e (Jun 27, 1962).

### **3. Factors Affecting Force of Doctrine [156-165]**

#### **a. In General [156-159]**

---

#### **§ 156 Generally**

|  |
|--|
| <p><a href="#">View Entire Section</a><br/><a href="#">Go to Parallel Reference Table</a><br/><a href="#">Go to Supplement</a></p> |
|--|

Stare decisis may be of lesser or stronger force, depending upon the nature of the case involved. 82 Stare decisis is particularly strong where a number of people have relied upon it to guide their conduct, 83 such as where certain precedents have become rules governing commercial transactions. 84 Courts are generally reluctant to deviate from a rule established by precedent where rights of the public are concerned. 85 The force of the doctrine is also less with regard to certain types of cases which tend to be determined according to their particular facts, such as dissolution of marriage, 86 child custody, 87 wills, 88 or laches. 89

---

#### **§ 156 ----Generally [SUPPLEMENT]**

##### **Case authorities:**

Generally, the principle of stare decisis and the interests that it serves—the evenhanded, predictable, and consistent development of legal principles, reliance on judicial decisions, and the actual and perceived integrity of the judicial process—counsel strongly against reconsideration of the United States Supreme Court's precedents. *Seminole Tribe v Florida* (1996, US) 134 L Ed 2d 252, 96 CDOS 2125, 96 Daily Journal DAR 3499, 9 FLW Fed S 484.

---

#### **Footnotes**

Footnote 82. *Scott v Gossett*, 66 Idaho 329, 158 P2d 804; *Daniel's Adm'r v Hoofnel*, 287

Ky 834, 155 SW2d 469.

Footnote 83. *Jensen v Reno Cent. Trades & Labor Council*, 68 Nev 269, 229 P2d 908, 28 BNA LRRM 2010, 19 CCH LC ¶ 66287 (ovrld in part on other grounds by *Vegas Franchises v Culinary Workers Union*, 83 Nev 422, 433 P2d 263, 67 BNA LRRM 2076, 56 CCH LC ¶ 51788).

Footnote 84. *Abbott v Los Angeles*, 50 Cal 2d 438, 326 P2d 484; *Liberty Nat'l Bank & Trust Co. v Loomis*, 275 Ky 445, 121 SW2d 947, 131 ALR 1419; *Heyert v Orange & Rockland Utilities, Inc.*, 17 NY2d 352, 271 NYS2d 201, 218 NE2d 263; *State v Surma*, 263 Wis 388, 57 NW2d 370.

Courts should be reluctant to disturb ruling precedents of long standing as to the rights and liabilities of parties to negotiable instruments. *Teeters v City Nat'l Bank*, 214 Ind 498, 14 NE2d 1004, 118 ALR 383.

Footnote 85. *White v Bateman*, 89 Ariz 110, 358 P2d 712.

Footnote 86. *In re Marriage of Misol* (Iowa App) 445 NW2d 411.

Footnote 87. *In re Marriage of Krebsbach* (Iowa App) 395 NW2d 189.

Footnote 88. *Presley v Hanks* (Tenn App) 782 SW2d 482; *Clark v Strother*, 238 Va 533, 385 SE2d 578.

Footnote 89. *Jennings v Schmitz*, 237 Iowa 580, 20 NW2d 897.

---

## § 157 Lack of argument on point

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

The stare decisis effect of a case is substantially diminished by the fact that the legal point involved in it was decided without argument, 90 or with only little argument. 91

---

### Footnotes

Footnote 90. *State v Mellenberger*, 163 Or 233, 95 P2d 709, 128 ALR 1506; *Birmingham v Walker*, 267 Ala 150, 101 So 2d 250, 70 ALR2d 464.

Footnote 91. *Pennsylvania-Reading Seashore Lines v Board of Public Utility Comm'rs*, 5 NJ 114, 74 A2d 265, cert den 340 US 876, 95 L Ed 637, 71 S Ct 122.

---

## § 158 Number of decisions setting precedent

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

The stare decisis effect of a case is strong where numerous precedents stand for the same principle of law. 92 Although a rule of law announced or applied only in a single precedent falls within the scope of the policy of stare decisis, 93 its stare decisis effect is weaker. 94

---

### Footnotes

Footnote 92. *Redwine v Jackson*, 254 Ala 564, 49 So 2d 115; *Williams v Union County Hospital Ass'n*, 237 NC 395, 75 SE2d 308.

Footnote 93. *White v Bateman*, 89 Ariz 110, 358 P2d 712; *St. Germain v Lapp*, 72 RI 42, 48 A2d 181, 166 ALR 450; *State v Packer Corp.*, 78 Utah 177, 2 P2d 114, affd 285 US 105, 76 L Ed 643, 52 S Ct 273, 79 ALR 546.

The fact that a case has never been cited does not detract from its effect as authority. *Ray v Denver*, 109 Colo 74, 121 P2d 886, 138 ALR 1485.

Footnote 94. *Dade County v Brigham (Fla)* 47 So 2d 602, 18 ALR2d 1221; *Humthlett v Reeves*, 211 Ga 210, 85 SE2d 25; *People ex rel. Rice v Graves*, 242 App Div 128, 273 NYS 582, affd 270 NY 498, 200 NE 288, cert den 298 US 683, 80 L Ed 1403, 56 S Ct 953; *State v Ballance*, 229 NC 764, 51 SE2d 731, 7 ALR2d 407; *State ex rel. Phillips v Carter*, 186 Okla 571, 99 P2d 1025; *Hooten v Hooten*, 120 Tex 538, 40 SW2d 52; *State v Surma*, 263 Wis 388, 57 NW2d 370.

---

## § 159 Unanimity of court members

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

For an opinion to have stare decise effect, at least a majority of the members of the court must have joined in the opinion. 95 However, a majority may be of a quorum, rather than of all the sitting judges. 96

A minority opinion has no binding precedential value, 97 nor does the opinion by an equally divided court. 98

Also, if a majority of the court agreed on a decision in the case, but less than a majority could agree on the reasoning for that decision, the decision has no stare decisis effect. 99 Concurring or dissenting opinions have no stare decisis effect. 1

Where the case is considered by a division of an appellate court, unless all the judges constituting a division concurred in the decision, it is not a controlling precedent. 2 In

at least one jurisdiction, only an en banc court of appeals, not a division, can overrule binding precedent. 3

---

## Footnotes

Footnote 95. *White v Bateman*, 89 Ariz 110, 358 P2d 712; *Hall v Hopper*, 234 Ga 625, 216 SE2d 839, related proceeding 234 Ga 800, 218 SE2d 76; *Brewer's Dairy v Dolloff (Me)* 268 A2d 636; *Van Alst v Kansas City (Mo App)* 186 SW2d 762; *Newton v Mann*, 111 Colo 76, 137 P2d 776, 147 ALR 767; *Jensen v Reno Cent. Trades & Labor Council*, 68 Nev 269, 229 P2d 908, 28 BNA LRRM 2010, 19 CCH LC ¶ 66287 (ovrld in part on other grounds by *Vegas Franchises v Culinary Workers Union*, 83 Nev 422, 433 P2d 263, 67 BNA LRRM 2076, 56 CCH LC ¶ 51788).

An opinion of the United States Supreme Court supported by less than a majority of all its members does not bind a state court. *Roofing Wholesale Co. v Palmer*, 108 Ariz 508, 502 P2d 1327, 65 ALR3d 496; *Bohn v Waddell*, 167 Ariz 344, 807 P2d 1, 82 Ariz Adv Rep 52, affd in part and revd in part on other grounds, vacated on other grounds, in part, remanded (App) 174 Ariz 239, 848 P2d 324, 122 Ariz Adv Rep 90, 16 EBC 2877, cert den (US) 125 L Ed 2d 693, 113 S Ct 3000, reh den (US) 125 L Ed 2d 766, 114 S Ct 15 and (disapproved on other grounds by *Harper v Virginia Dep't of Taxation (US)* 125 L Ed 2d 74, 113 S Ct 2510, 93 CDOS 4491, 93 Daily Journal DAR 7730, 16 EBC 2313, 93 TNT 131-6, 7 FLW Fed S 456); *Baker v State*, 15 Md App 73, 289 A2d 348, cert den 410 US 969, 35 L Ed 2d 705, 93 S Ct 1449.

Footnote 96. *Negri v Slotkin*, 397 Mich 105, 244 NW2d 98; *State v Ballance*, 229 NC 764, 51 SE2d 731, 7 ALR2d 407.

Footnote 97. *Commonwealth v Little*, 432 Pa 256, 248 A2d 32.

Footnote 98. *France v Nelson*, 292 Ark 219, 729 SW2d 161; *State v Jones*, 44 NM 623, 107 P2d 324.

Footnote 99. *Grimm v Ford Motor Co.*, 157 Mich App 633, 403 NW2d 482, CCH Prod Liab Rep ¶ 11371, app den 428 Mich 902, 406 NW2d 465; *State v Smith (Mo)* 422 SW2d 50, cert den 393 US 895, 21 L Ed 2d 176, 89 S Ct 150; *Brown v H & D Duenne Farms, Inc. (Mo App)* 799 SW2d 621; *Chambers v Owens-Ames-Kimball Co.*, 146 Ohio St 559, 33 Ohio Ops 60, 67 NE2d 439, 165 ALR 1373.

Footnote 1. *Lendsay v Cotton (Fla App D3)* 123 So 2d 745, 95 ALR2d 1029; *Boode v Allied Mut. Ins. Co. (Wyo)* 458 P2d 653.

Footnote 2. *Gielow v Strickland*, 185 Ga App 85, 363 SE2d 278; *Sheet Metal Workers International Asso. v Carter*, 133 Ga App 872, 212 SE2d 645, 89 BNA LRRM 3041, 75 CCH LC ¶ 53536, cert den 423 US 1078, 47 L Ed 2d 89, 96 S Ct 866, 91 BNA LRRM 2167, 78 CCH LC ¶ 53804.

Footnote 3. *Asuncion v Columbia Hosp. for Women (Dist Col App)* 514 A2d 1187 (criticized on other grounds by *Williams v Baker (Dist Col App)* 572 A2d 1062) and (criticized on other grounds by *Jones v Howard University, Inc. (Dist Col App)* 589 A2d 419) and (criticized on other grounds as stated in *Washington v John T. Rhines Co. (Dist*

## **b. Nature of Issues Involved [160-163]**

---

### **§ 160 Property rights**

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

Courts are not required to apply principles derived from long-standing precedents in cases involving property rights, so-called "rules of property," 4 and stare decisis is not limited to precedents involving property rights. 5 However, courts generally follow the doctrine of stare decisis more strictly with regard to precedents involving property rights, 6 particularly real property rights, 7 where such rights have become vested in reliance on the precedents. 8 By the same token, where no rule of property or vested right is affected, stare decisis tends to have less force. 9

Stare decisis also does not have full force with respect to rules of property where the court of last resort has not decided the issue. 10

---

#### **Footnotes**

Footnote 4. *Hanks v McDanell*, 307 Ky 243, 210 SW2d 784, 17 ALR2d 1; *In re West's Estate*, 289 NY 423, 46 NE2d 501, 149 ALR 1365, *affd* 321 US 36, 88 L Ed 526, 64 S Ct 384; *Oklahoma County v Queen City Lodge, I. O. O. F.*, 195 Okla 131, 156 P2d 340; *United States Nat'l Bank v Daniels*, 180 Or 356, 177 P2d 246, 171 ALR 644.

Footnote 5. *Abbott v Los Angeles*, 50 Cal 2d 438, 326 P2d 484; *Nash Engineering Co. v Marcy Realty Corp.*, 222 Ind 396, 54 NE2d 263; *Jensen v Reno Cent. Trades & Labor Council*, 68 Nev 269, 229 P2d 908, 28 BNA LRRM 2010, 19 CCH LC ¶ 66287 (overruled in part on other grounds by *Vegas Franchises v Culinary Workers Union*, 83 Nev 422, 433 P2d 263, 67 BNA LRRM 2076, 56 CCH LC ¶ 51788); *In re Burt's Estate*, 353 Pa 217, 44 A2d 670, 162 ALR 1053.

Footnote 6. *Abbott v Los Angeles*, 50 Cal 2d 438, 326 P2d 484; *Publix Cab Co. v Colorado Nat'l Bank*, 139 Colo 205, 338 P2d 702, 78 ALR2d 198; *Neff v George*, 364 Ill 306, 4 NE2d 388 (overruled in part on other grounds by *Tuthill v Rendelman*, 387 Ill 321, 56 NE2d 375); *Liberty Nat'l Bank & Trust Co. v Loomis*, 275 Ky 445, 121 SW2d 947, 131 ALR 1419; *In re Estate of Brown*, 362 Mich 47, 106 NW2d 535, 100 ALR2d 322; *Johnson v Chicago, B. & Q. R. Co.*, 243 Minn 58, 66 NW2d 763; *State v California Co.*, 79 ND 430, 56 NW2d 762; *In re Decker's Estate*, 353 Pa 509, 46 A2d 218, 165 ALR 546; *Barnes v Walker*, 191 Tenn 364, 234 SW2d 648; *Snidow v Snidow*, 192 Va 60, 63 SE2d 620, 25 ALR2d 326; *State v Surma*, 263 Wis 388, 57 NW2d 370.

Footnote 7. *T. S. Faulk & Co. v Boutwell*, 242 Ala 526, 7 So 2d 490; *Nash Engineering Co. v Marcy Realty Corp.*, 222 Ind 396, 54 NE2d 263; *Lincoln Joint Stock Land Bank v*



Rydberg, 234 Iowa 1143, 15 NW2d 246, 155 ALR 62.

Footnote 8. Johnson v Chicago, B. & Q. R. Co., 243 Minn 58, 66 NW2d 763.

Footnote 9. Ficke v Prudential Ins. Co., 305 Ky 172, 202 SW2d 429, 175 ALR 1215 (ovrld in part on other grounds by Johnson v Johnson's Adm'x (Ky) 297 SW2d 753); Kabatchnick v Hanover-Elm Bldg. Corp., 328 Mass 341, 103 NE2d 692, 30 ALR2d 918, appeal after remand 331 Mass 366, 119 NE2d 169; Heyert v Orange & Rockland Utilities, Inc., 17 NY2d 352, 271 NYS2d 201, 218 NE2d 263.

Footnote 10. Swift v Kirby (Tenn) 737 SW2d 271.

---

## **§ 161 --Involving constitutional questions**

[View Entire Section](#)  
[Go to Parallel Reference Table](#)  
[Go to Supplement](#)

Stare decisis has the greatest force in actions involving constitutional issues, 11 particularly where a constitutional provision is to be interpreted. 12

However, there is also authority for the view that the doctrine of stare decisis is applied with less force where matters involving interpretation of the constitution are concerned, inasmuch as judicial error in construing the constitution cannot be corrected by the legislature and can be corrected only by the court. 13

---

## **§ 161 --Involving constitutional questions [SUPPLEMENT]**

### **Case authorities:**

The United States Supreme Court will conclude that a prior Supreme Court case was wrongly decided and should be, and is, overruled, where (1) in the several years since the case was decided, it has proven to be a solitary departure from established law, (2) reconsidering the decision in the case, the court concludes that none of the policies underlying stare decisis require the court's continuing adherence to the case's holding, (3) the decision has, since its issuance, been of questionable precedential value, largely because a majority of the court expressly disagreed with the rationale of the plurality, (4) the case involved the interpretation of the Federal Constitution and therefore may be altered only by constitutional amendment or revision by the Supreme Court, and (5) both the result in the case and the plurality's rationale depart from the court's established understanding of the Constitution's Eleventh Amendment and undermine the accepted function of the Constitution's Article III. (Stevens, J., dissented from this holding.) Seminole Tribe v Florida (1996, US) 134 L Ed 2d 252, 96 CDOS 2125, 96 Daily Journal DAR 3499, 9 FLW Fed S 484.

---

### **Footnotes**

Footnote 11. *Scott v Gossett*, 66 Idaho 329, 158 P2d 804; *Daniel's Adm'r v Hoofnel*, 287 Ky 834, 155 SW2d 469.

Footnote 12. *State ex rel. Phillips v Carter*, 186 Okla 571, 99 P2d 1025; *Wichita Falls use of L. E. Whitham & Co. v Williams*, 119 Tex 163, 26 SW2d 910, 79 ALR 704.

Footnote 13. *Oklahoma County v Queen City Lodge, I. O. O. F.*, 195 Okla 131, 156 P2d 340.

---

## § 162 Construction of statutes

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

The legislature is deemed to have impliedly approved a court of last resort's interpretation of a statute where it fails to redefine the statute, 14 particularly where the court's construction has been of long standing, 15 or where it enacted substantially the same statute as a repealed statute that a court of last resort had construed, 16 unless the language of the reenactment shows a contrary intention. 17 A court may reexamine the statute and overrule its prior construction by the fact that the legislature took no action to show its disagreement with that construction. 18 Cases construing a statute do not control an interpretation of the statute as amended. 19 Although the fact that the courts have for many years enforced a statute without challenge to its constitutionality is very persuasive of the statute's validity, 20 the court may overrule its holding that a particular statute is valid if it determines on subsequent examination that the statute is invalid. 21

---

### Footnotes

Footnote 14. *In re Halcomb*, 21 Cal 2d 126, 130 P2d 384; *Johnson v State (Fla)* 91 So 2d 185; *Walling v Bown*, 9 Idaho 740, 76 P 318, *affd* 204 US 320, 51 L Ed 503, 27 S Ct 292; *Industrial Loan & Thrift Corp. v Swanson*, 223 Minn 346, 26 NW2d 625, 171 ALR 244; *Willott v Willott*, 333 Mo 896, 62 SW2d 1084, 89 ALR 114 (*ovrld* in part on other grounds by *Townsend v Townsend (Mo)* 708 SW2d 646); *Bottomly v Ford*, 117 Mont 160, 157 P2d 108; *State v Davidson*, 242 Wis 406, 8 NW2d 275, 145 ALR 1411.

Footnote 15. *St. Germain v Lapp*, 72 RI 42, 48 A2d 181, 166 ALR 450; *Hooten v Hooten*, 120 Tex 538, 40 SW2d 52; *Snidow v Snidow*, 192 Va 60, 63 SE2d 620, 25 ALR2d 326.

Footnote 16. *State v Deming*, 66 NM 175, 344 P2d 481, 77 ALR2d 964; *Cunningham v Cunningham*, 120 Tex 491, 40 SW2d 46, 75 ALR 1305.

Footnote 17. *Nash Engineering Co. v Marcy Realty Corp.*, 222 Ind 396, 54 NE2d 263.

Footnote 18. *Autio v Proksch Constr. Co.*, 377 Mich 517, 141 NW2d 81; *Hungerford v Portland Sanitarium & Benevolent Asso.*, 235 Or 412, 384 P2d 1009; *In re Elliott's*

Estate, 22 Wash 2d 334, 156 P2d 427, 157 ALR 1335.

Footnote 19. *Salitan v Carter, Ealey & Dinwiddie* (Mo App) 332 SW2d 11, 80 ALR2d 455 (criticized on other grounds by *Chase Manhattan Bank, N.A. v George Pontiac-Olds-GMC, Inc.* (Mo App) 662 SW2d 312).

Footnote 20. *Drury v Franke*, 247 Ky 758, 57 SW2d 969, 88 ALR 917 (criticized on other grounds as stated in *Stockdale v Eads* (Ky) 263 SW2d 133).

Footnote 21. *Portland v Welch*, 154 Or 286, 59 P2d 228, 106 ALR 1188 (among conflicting authorities on other grounds noted in *Mid-County Future Alternatives Comm. v City of Portland*, 310 Or 152, 795 P2d 541).

---

## § 163 Procedural matters

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

While some jurisdictions weigh *stare decisis* heavily in procedural or practice matters, 22 other jurisdictions apply *stare decisis* with less weight in procedural than in substantive law matters. 23

---

## Footnotes

Footnote 22. *Lincoln Joint Stock Land Bank v Rydberg*, 234 Iowa 1143, 15 NW2d 246, 155 ALR 62; *Crow v State*, 147 Tex Crim 292, 180 SW2d 354; *Kraettli v North Coast Transp. Co.*, 166 Wash 186, 6 P2d 609, 80 ALR 1520.

Footnote 23. *Cottrell v Amerkan*, 160 Fla 390, 35 So 2d 383; *Barnes v Walker*, 191 Tenn 364, 234 SW2d 648.

### c. Court That Rendered Decision [164, 165]

---

## § 164 Generally; courts of another jurisdiction

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

The decisions of the courts of foreign nations do not bind state courts in the interpretation of state law. 24 However, under conflict of laws principles, 25 such decisions may be persuasive authority, especially if they are from a British court. 26

---

## Footnotes

Footnote 24. *Pekin Ins. Co. v Home Ins. Co.* (1st Dist) 134 Ill App 3d 31, 89 Ill Dec 72, 479 NE2d 1078; *Application of Harper* (Fla) 84 So 2d 700, 54 ALR2d 1272.

Footnote 25. As to the recognition and enforcement of the laws of a foreign nation in state court, see 16 Am Jur 2d, Conflict of Laws §§ 7-22.

Footnote 26. *Standard Oil Co. v United States*, 340 US 54, 95 L Ed 68, 71 S Ct 135; *People v Vogel*, 46 Cal 2d 798, 299 P2d 850.

The Texas Court of Criminal Appeals will follow the common law of England as to grounds for contempt to the extent that it is consistent with the Texas constitution and laws, where Texas lacks a statute providing for such grounds. *Ex parte Krupps* (Tex Crim) 712 SW2d 144, cert den 479 US 1102, 94 L Ed 2d 184, 107 S Ct 1333.

---

## § 165 Court of different rank

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

Generally, a court's decision has stare decisis effect upon a lower court or one of the same rank, but not upon a court higher in rank than the court in which the decision is cited as precedent. 27 Thus, under the doctrine of stare decisis, a decision of the state's supreme court binds the state court of appeals 28 and the trial courts. 29 Likewise, decisions of the court of appeals and intermediate appellate courts should be followed by all lower courts, 30 but will not bind the state supreme court. 31 Some jurisdictions view a case as having less stare decisis force where the decision was rendered by a court other than the highest court of the jurisdiction. 32 In addition, an appellate court is not bound by a decision of an appellate division of a trial court. 33 While in some jurisdictions the decision of one panel of the state court of appeals binds the other panels, 34 in others, a panel is not obligated to follow the decisions of previous panels. 35

A court lower in rank than the court which made the decision invoked as a precedent cannot deviate from such precedent and make a contrary decision, irrespective of whether it considers the rule laid down in such precedent to be incorrect. 36 Sometimes the decision of a lower court, not abiding by the rule established in a prior decision of the court of last resort, is, on appeal, vindicated by the court of last resort, in that it affirms the decision of the lower court and, thus, itself overrules its prior decision. 37

---

## Footnotes

Footnote 27. *In re Estate of Klingaman* (Sup) 36 Del Ch 200, 128 A2d 311, 60 ALR2d 1175 (criticized on other grounds as stated in *Waggoner v Laster* (Del Sup) 581 A2d 1127); *State v Mellenberger*, 163 Or 233, 95 P2d 709, 128 ALR 1506; *Thomas v Meyer* (Tex Civ App) 168 SW2d 681; *State Bd. of Equalization v Courtesy Motors* (Wyo) 362

Footnote 28. *State v Bilotta* (Ala Civ App) 522 So 2d 300; *In re Marriage of Thorlin* (App) 155 Ariz 357, 746 P2d 929; *Huckabee v State*, 30 Ark App 82, 785 SW2d 223; *Greger v Greger*, 22 Conn App 596, 578 A2d 162, app den 216 Conn 820, 581 A2d 1055 and app den 216 Conn 820, 581 A2d 1055 and on remand (Conn Super) 1992 Conn Super LEXIS 3332, vacated on other grounds, in part, on reh (Conn Super) 1993 Conn Super LEXIS 1391, supp op (Conn Super) 1993 Conn Super LEXIS 3144; *First Union Nat'l Bank v J. Reisbaum Co.*, 190 Ga App 234, 378 SE2d 317; *Patton v State* (Ind App) 507 NE2d 624; *Batt v Globe Engineering Co.*, 13 Kan App 2d 500, 774 P2d 371, review den 245 Kan 782; *Commonwealth v Basnight* (Ky App) 770 SW2d 231; *Darnall v John K. Darnall, Inc.* (La App 3d Cir) 526 So 2d 1317, cert den (La) 531 So 2d 273; *People v Mitchell*, 428 Mich 364, 408 NW2d 798; *State v Tubbs* (Mo App) 806 SW2d 746; *Incorporated County of Los Alamos v Montoya* (App) 108 NM 361, 772 P2d 891; *State v Pendergrass* (Tenn Crim) 795 SW2d 150, reh den (Tenn Crim) 1989 Tenn Crim App LEXIS 760 and cert den 496 US 937, 110 L Ed 2d 662, 110 S Ct 3215; *State v Creekmore*, 55 Wash App 852, 783 P2d 1068, review den 114 Wash 2d 1020, 792 P2d 533; *State v Quiroz* (App) 149 Wis 2d 691, 439 NW2d 621.

A court of appeals is bound by a decision of a state supreme court concerning federal law, absent a controlling United States Supreme Court decision, even where lower court opinions conflict. *Harrison v State* (Alaska App) 791 P2d 359; *Jendro v Honeywell, Inc.* (Minn App) 392 NW2d 688.

In the face of inconsistent state supreme court decisions, the court of appeal must follow the most recent decision. *Luhman v Beecher* (App) 144 Wis 2d 781, 424 NW2d 753.

Footnote 29. *Hernandez v Garwood* (Fla) 390 So 2d 357; *Lucky v Fricks* (La App 2d Cir) 511 So 2d 1315, cert den (La) 514 So 2d 455 and (disapproved on other grounds as stated in *First Downtown Dev. v Cimochowski* (La App 2d Cir) 613 So 2d 671); *Bourjois Sales Corp. v Dorfman*, 273 NY 167, 7 NE2d 30, 110 ALR 1411.

A trial court may receive evidence on an issue where it believes that the state supreme court may overrule its precedent on the issue. *Las Vegas v Oman* (App) 110 NM 425, 796 P2d 1121, cert den 110 NM 282, 795 P2d 87 and appeal after remand on other grounds, remanded sub nom *State ex rel. Martinez v City of Las Vegas* (App) 118 NM 257, 880 P2d 868, cert gr (NM) 1994 NM LEXIS 315.

◆ Observation: It has been held that *stare decisis* applies only to decisions of courts of last resort. *Bryan v W. T. Smith Lumber Co.*, 278 Ala 538, 179 So 2d 287.

Footnote 30. *Detroit v Qualls*, 434 Mich 340, 454 NW2d 374, reh den 434 Mich 1213, later proceeding (Mich App) 1991 Mich App LEXIS 289 and stay vac, app den 437 Mich 1017, 472 NW2d 636, reconsideration den (Mich) 1991 Mich LEXIS 1769; *Lee v Consolidated Edison Co.*, 98 Misc 2d 304, 413 NYS2d 826; *San Antonio v Gonzales* (Tex App San Antonio) 737 SW2d 78.

Footnote 31. *National Indem. Co. v Spring Branch State Bank*, 162 Tex 521, 348 SW2d 528, 8 ALR3d 229.

Footnote 32. *State ex rel. Department of Highways v Havard*, 239 La 133, 118 So 2d

131; *Platt v Rapid City*, 67 SD 245, 291 NW 600; *Austin v Schmedes*, 154 Tex 416, 279 SW2d 326, 52 ALR2d 680 (superseded by statute on other grounds as stated in *John F. Buckner & Sons v Allen* (Tex Civ App Austin) 289 SW2d 387); *Campbell v Campbell* (Tex Civ App Austin) 362 SW2d 904, 3 ALR3d 1206, writ dismissed (Feb 13, 1963).

Footnote 33. *State v Hyatt*, 9 Conn App 426, 519 A2d 612.

Footnote 34. *Commonwealth v Burns*, 240 Va 171, 395 SE2d 456; *Sommerfield v Sommerfield* (App) 154 Wis 2d 840, 454 NW2d 55.

Footnote 35. *Nungesser v Nungesser* (La App 1st Cir) 558 So 2d 695, cert den (La) 560 So 2d 30; *Barbour v Department of Social Services*, 172 Mich App 275, 431 NW2d 482, 48 BNA FEP Cas 778, app den 432 Mich 915, reconsideration den (Mich) 1989 Mich LEXIS 1814.

A ruling by one division of a court of appeals on jurisdiction does not bind other divisions. *Denver Fire Reporter & Protective Co. v Dutton* (Colo App) 736 P2d 1255, cert den (Colo) 753 P2d 243.

Opinions of courts of coordinate jurisdiction do not bind courts of equivalent rank. *Schomber v Prudential Ins. Co.*, 214 NJ Super 309, 518 A2d 1138 (disapproved on other grounds by *Kordell v Allstate Ins. Co.*, 230 NJ Super 505, 554 A2d 1).

Footnote 36. *Mitchell v Refugio* (Tex Civ App) 265 SW2d 261, writ refused.

Footnote 37. *Zeeb v Atlas Powder Co.* (Sup) 32 Del Ch 486, 87 A2d 123; *Alexander v Delgado*, 84 NM 717, 507 P2d 778 (criticized on other grounds as stated in *State v Parish* (NM) 118 NM 39, 878 P2d 988).

## **B. Effect Of Decisions From Other Jurisdictions [166-171]**

### **Research References**

ALR Digest: Courts §§ 365-376

ALR Index: Precedents

### **1. Decisions Of Another State's Courts [166-168]**

---

#### **§ 166 Generally**

|   |
|---|
| <p><a href="#">View Entire Section</a><br/><a href="#">Go to Parallel Reference Table</a></p> |
|---|

The decision of a state court does not have stare decisis effect in a court of another state. 38 However, such decisions may guide a state court's decision, 39 and may be followed where the other court's reasoning is persuasive, 40 where controlling precedent in the forum is absent, 41 or where the law in the forum jurisdiction is unclear.

A state court will not follow the ruling of another jurisdiction where such ruling is based on undetermined reasoning, 43 is against the forum state's public policy, 44 or is based on reasoning that is simply unpersuasive. 45

The force of a case as out-of-state precedent is diminished by statutory reversal of the rule announced in the decision. 46

Where there are two lines of decisions in the courts of sister states, the line which reflects the soundest reasoning in the premises will be followed regardless of numerical superiority. 47 The fact that decisions from another state did not emanate from the highest court of that state does not deprive them of persuasive value, particularly where no reversal of those decisions by a higher tribunal was sought. 48

---

### Footnotes

Footnote 38. *Mosby v Mutual Life Ins. Co.*, 405 Ill 599, 92 NE2d 103, 18 ALR2d 1054; *Griffith v Gulf Refining Co.*, 215 Miss 15, 60 So 2d 518, 1 OGR 1627, sugg of error overr 215 Miss 35, 61 So 2d 306, 1 OGR 1637; *Morrison v Burlington Industries*, 304 NC 1, 282 SE2d 458; *McCaffrey v Lake*, 234 Wis 251, 290 NW 283, 127 ALR 233.

Footnote 39. *Ettore v Philco Television Broadcasting Corp.* (CA3 Pa) 229 F2d 481, 108 USPQ 187, 58 ALR2d 626, cert den 351 US 926, 100 L Ed 1456, 76 S Ct 783, 109 USPQ 517; *State v Ball*, 124 NH 226, 471 A2d 347; *Heiligman v Chambers* (Okla) 338 P2d 144, 75 ALR2d 583.

Even dissenting opinions rendered in courts of other states may assist the forum court in determining, with regard to a matter of first impression in the forum state, which of two lines of authority is the better one. *Mitchell v Van Pelt*, 58 NM 69, 265 P2d 679, 42 ALR2d 1211.

Footnote 40. *Bennett v New York Life Ins. Co.*, 63 Idaho 427, 121 P2d 551, 142 ALR 841; *People ex rel. Latimer v Board of Education*, 394 Ill 228, 68 NE2d 305, 167 ALR 1467; *In re Cooke's Estate*, 207 Minn 437, 292 NW 96; *Griffith v Gulf Refining Co.*, 215 Miss 15, 60 So 2d 518, 1 OGR 1627, sugg of error overr 215 Miss 35, 61 So 2d 306, 1 OGR 1637; *Electrical Prods. Consol. v Bodell*, 132 Mont 243, 316 P2d 788, 69 ALR2d 1318; *Brewer v Brewer*, 242 SC 9, 129 SE2d 736; *National Indem. Co. v Spring Branch State Bank*, 162 Tex 521, 348 SW2d 528, 8 ALR3d 229.

Minnesota cases regarding sentencing are persuasive authority in Washington state. *In re King*, 54 Wash App 50, 772 P2d 521; *State v Falling*, 50 Wash App 47, 747 P2d 1119 (criticized on other grounds by *State v Campas*, 59 Wash App 561, 799 P2d 744).

Footnote 41. *Kresha v Kresha*, 216 Neb 377, 344 NW2d 906.

Footnote 42. *Guam v Ojeda* (CA9 Guam) 758 F2d 403 (where Guam law is unclear, California cases are persuasive authority).

Footnote 43. *Spielman v State*, 298 Md 602, 471 A2d 730.

Footnote 44. *Griffith v Gulf Refining Co.*, 215 Miss 15, 60 So 2d 518, 1 OGR 1627, sugg of error overr 215 Miss 35, 61 So 2d 306, 1 OGR 1637; *Northcut v Church*, 135 Tenn 541, 188 SW 220.

Footnote 45. *Auckenthaler v Grundmeyer*, 110 Nev 682, 877 P2d 1039.

Footnote 46. *Tait v Peck*, 346 Mass 521, 194 NE2d 707, 98 ALR2d 503.

Footnote 47. *Oneida County Fair Bd. v Smylie*, 86 Idaho 341, 386 P2d 374.

Absent a federal question, the Federal Constitution does not require consistency or uniformity among the decisions of the several state courts. *Worcester County Trust Co. v Riley*, 302 US 292, 82 L Ed 268, 58 S Ct 185.

Footnote 48. *Dennis v Commissioner of Corps. & Taxation*, 340 Mass 629, 165 NE2d 893, 81 ALR2d 1226.

---

## § 167 Where sister state decision construes statute

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

A court may give decisions of another state great weight where they construe statutory language identical or similar to the statutory language under consideration, 49 particularly where the forum state's law was modeled after that of the other state. 50 However, sister state decisions construing statutes substantially different from, though concerning the same general subject as, the one under consideration will be accorded little weight. 51 Where the statute of the forum state was modeled after a statute of the sister state, there is authority for the view that the judicial construction of that statute in the sister state before the statute was enacted in the forum state is adopted with the statute. 52

---

## Footnotes

Footnote 49. *Brewer v Brewer*, 242 SC 9, 129 SE2d 736.

Footnote 50. *State v Eichorn* (App) 143 Ariz 609, 694 P2d 1223; *Best v Yerkes*, 247 Iowa 800, 77 NW2d 23, 60 ALR2d 1354; *State v Hill*, 189 Kan 403, 369 P2d 365, 91 ALR2d 750; *Tuttle v Union Bank & Trust Co.*, 112 Mont 568, 119 P2d 884, 139 ALR 127; *Stocks v Stocks*, 64 Nev 431, 183 P2d 617; *Sanguin v Wallace*, 205 Okla 28, 234 P2d 394, 42 ALR2d 511; *Bright v Orr-Lyons Mill*, 285 SC 58, 328 SE2d 68.

Footnote 51. *Arkansas State Board of Architects v Bank Bldg. & Equipment Corp.*, 225 Ark 889, 286 SW2d 323, 56 ALR2d 720; *Ward v Baskin* (Fla) 94 So 2d 859, 66 ALR2d 1320; *In re Smith's Estate*, 343 Mich 291, 72 NW2d 287, 51 ALR2d 847; *Iszler v Jorda* (ND) 80 NW2d 665, 64 ALR2d 696; *Safeway Stores, Inc. v Oklahoma Retail Grocers*



Asso. (Okla) 322 P2d 179, 70 ALR2d 1068, affd 360 US 334, 3 L Ed 2d 1280, 79 S Ct 1196.

Footnote 52. State v Haas, 138 Ariz 413, 675 P2d 673 (superseded by statute on other grounds as stated in State v Bridgeforth, 156 Ariz 60, 750 P2d 3, 1 Ariz Adv Rep 32); State v Hill, 189 Kan 403, 369 P2d 365, 91 ALR2d 750; Padilla v Henning Hotel Co., 78 Wyo 144, 319 P2d 874, 33 CCH LC ¶ 71195, 65 ALR2d 968.

---

## **§ 168 Where law of sister state is applicable under conflict of laws principles**

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

In determining and applying the law of a sister state, the forum court generally must follow the other state's judicial decisions as to the law of that state, <sup>53</sup> whether such law is derived from that state's common law <sup>54</sup> or its statutes. <sup>55</sup> Where the law in the other state is uncertain, the forum court may follow its own opinion on the legal point involved, <sup>56</sup> or, in the absence of controlling precedents in the other state, apply its own precedents. <sup>57</sup>

◆ Practice guide: Numerous states have adopted the Uniform Certification of Questions of Law Act, which grants the supreme court of the enacting state the authority to answer questions of law certified by the supreme court (or an intermediate appellate court) of a sister state, if it appears to the certifying court that there is no controlling precedent in the decisions of the enacting state. <sup>58</sup>

---

### **Footnotes**

Footnote 53. John Roane, Inc. v Tweed (Sup) 33 Del Ch 4, 89 A2d 548, 41 ALR2d 1.

As to application of out-of-state laws pursuant to conflict of laws principles, see 16 Am Jur 2d, Conflict of Laws.

Footnote 54. Bostrom v Jennings, 326 Mich 146, 40 NW2d 97.

But see Johnson v Heller (La App 2d Cir) 33 So 2d 776, limiting the application of this principle to statutory law by applying a presumption that the common law of a sister state is the same as that of the forum state.

Footnote 55. Fox v Warner Bros. Pictures, Inc. (DC Del) 95 F Supp 360; Spellacy v American Life Ins. Asso., 144 Conn 346, 131 A2d 834.

Footnote 56. Bostrom v Jennings, 326 Mich 146, 40 NW2d 97.

Footnote 57. Dodwell v Missouri P. R. Co. (Mo) 384 SW2d 643, 11 ALR3d 1156.

Footnote 58. Uniform Certification of Questions of Law Act, § 1.

As to certification, to state courts by federal courts, of questions of state law, see 32-32B Am Jur 2d, Federal Practice and Procedure.

## 2. Decisions Of Federal Courts [169-171]

---

### § 169 Generally; decisions construing state law

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

State courts are not bound to follow a decision of a federal court, including the United States Supreme Court, dealing with state law. 59 Accordingly, a state court is not bound to follow any federal court's decision construing the state's constitution. 60 However, a federal decision construing state law may be persuasive authority in that state. 61 Thus, a federal court's construction of a state constitution may have persuasive effect on the courts of that state. 62 Where a provision of a state constitution is similar to a provision of the Federal Constitution, a state court in construing the state provision may follow the federal court decision if and to the extent it is persuasive, although it is not bound to do so. 63

Where federal and state statutes are similar and are intended to accomplish the same objects, state courts, in construing the state statutes, will be strongly inclined to follow federal court construction, 64 especially where the state law was purposely modeled on the corresponding federal statute. 65 However, the federal court's interpretation does not bind the state court. 66

Even though the United States Supreme Court has declared a state statute valid under the Federal Constitution, a state court may find that the statute is unconstitutional under the state's constitution. 67

---

### Footnotes

Footnote 59. *McClain v Church*, 72 Ariz 354, 236 P2d 44, 29 ALR2d 746 (superseded by statute on other grounds as stated in *Hughes v Industrial Comm'n*, 27 Ariz App 152, 551 P2d 962) and (superseded by statute on other grounds as stated in *Smith v Arizona Dep't of Economic Sec. (App)* 128 Ariz 21, 623 P2d 810); *Miller v Dilts (Ind)* 463 NE2d 257; *State Bd. of Education v Houghton Lake Community Schools*, 430 Mich 658, 425 NW2d 80; *Smithpeter v Wabash R. Co.*, 360 Mo 835, 231 SW2d 135, 19 ALR2d 950; *Sessions v State*, 106 Nev 186, 789 P2d 1242; *Johnson v Ruark Obstetrics & Gynecology Assoc., P.A.*, 327 NC 283, 395 SE2d 85, reh den 327 NC 644, 399 SE2d 133; *Olson v Connerly (App)* 151 Wis 2d 663, 445 NW2d 706, affd 156 Wis 2d 488, 457 NW2d 479.

The rules of stare decisis do not require a Florida appellate court to follow federal court decisions that construe Florida's substantive law. *Bridges v Williamson (Fla App D2)*

449 So 2d 400, 10 Media L R 1983.

Footnote 60. *Glenn v Field Packing Co.*, 290 US 177, 78 L Ed 252, 54 S Ct 138; *Hawks v Hamill*, 288 US 52, 77 L Ed 610, 53 S Ct 240; *Quality Oil Co. v E. I. Du Pont De Nemours & Co.*, 182 Kan 488, 322 P2d 731; *Lone v Montgomery County*, 85 Md App 477, 584 A2d 142.

Footnote 61. *Stensvad v Ottman*, 123 Mont 158, 208 P2d 507; *Akron v Mingo*, 169 Ohio St 511, 9 Ohio Ops 2d 7, 160 NE2d 225, 74 ALR2d 585.

Footnote 62. *Portland v Thornton*, 174 Or 508, 149 P2d 972, cert den 323 US 770, 89 L Ed 616, 65 S Ct 123.

Footnote 63. *State v Jones (Alaska)* 706 P2d 317; *Pool v Superior Court*, 139 Ariz 98, 677 P2d 261; *People v Teresinski*, 30 Cal 3d 822, 180 Cal Rptr 617, 640 P2d 753 (not followed on other grounds by *People v Daye* (Cal App) 222 Cal Rptr 614); *State v Howes (Me)* 432 A2d 419; *State v Johnson*, 221 Mont 503, 719 P2d 1248; *State v Ball*, 124 NH 226, 471 A2d 347; *Greenberg v Kimmelman*, 99 NJ 552, 494 A2d 294; *Central Sav. Bank v New York*, 280 NY 9, 19 NE2d 659, 121 ALR 615, cert den 306 US 661, 83 L Ed 1058, 59 S Ct 790; *Henry v Edmisten*, 315 NC 474, 340 SE2d 720; *In re Clark*, 303 NC 592, 281 SE2d 47; *Portland v Thornton*, 174 Or 508, 149 P2d 972, cert den 323 US 770, 89 L Ed 616, 65 S Ct 123; *State v Neville (SD)* 346 NW2d 425 (ovrld in part on other grounds by *State v Hoenscheid (SD)* 374 NW2d 128).

Footnote 64. *Sportsmen's Boating Corp. v Hensley*, 192 Conn 747, 474 A2d 780 (superseded by statute on other grounds as stated in *Fortini v New England Log Homes, Inc.*, 4 Conn App 132, 492 A2d 545) and (superseded by statute on other grounds as stated in *Fichera v Mine Hill Corp.*, 207 Conn 204, 541 A2d 472); *McCallum v Twiggs County Bank*, 172 Ga 591, 158 SE 302, 74 ALR 932, subsequent app 43 Ga App 442, 159 SE 309; *People ex rel. Scott v College Hills Corp.*, 91 Ill 2d 138, 61 Ill Dec 766, 435 NE2d 463, 1982-1 CCH Trade Cases ¶ 64613; *Snowwhite v State*, 243 Md 291, 221 A2d 342, 19 ALR3d 1155; *Dayton Co. v Carpet, L. & R. F. D. Union*, 229 Minn 87, 39 NW2d 183, 24 BNA LRRM 2228, 16 CCH LC ¶ 65252, app dismd 339 US 906, 94 L Ed 1334, 70 S Ct 570, 25 BNA LRRM 2487, 17 CCH LC ¶ 65642; *Smith v Video Lottery Consultants*, 260 Mont 54, 858 P2d 11, 1993-2 CCH Trade Cases ¶ 70375; *Ventura v State Equal Opportunity Comm'n*, 246 Neb 116, 517 NW2d 368; *Matos v City of Phoenix (App)* 176 Ariz 125, 859 P2d 748, 131 Ariz Adv Rep 36, 2 AD Cas 1458; *State v Kennedy*, 295 Or 260, 666 P2d 1316; *LaShay v Department of Social & Rehabilitation Servs.*, 160 Vt 60, 625 A2d 224.

In judging whether the state Labor Relation Board's interpretation is reasonable, the court may be guided by federal law. *Board of Educ. v State Bd. of Labor Relations*, 217 Conn 110, 584 A2d 1172 (1991).

Footnote 65. *People v Riley (Colo)* 708 P2d 1359; *Shaw v North Am. Title Co.*, 76 Hawaii 323, 876 P2d 1291; *In re Rogers' Estate*, 296 NY 676, 70 NE2d 170, 174 ALR 625, reh den 296 NY 772, 70 NE2d 748; *Akron v Mingo*, 169 Ohio St 511, 9 Ohio Ops 2d 7, 160 NE2d 225, 74 ALR2d 585; *State v Leach*, 124 Wis 2d 648, 370 NW2d 240, habeas corpus proceeding (CA7 Wis) 911 F2d 1249, cert den 498 US 972, 112 L Ed 2d 424, 111 S Ct 441, post-conviction proceeding (Wis App) 1993 Wisc App LEXIS 1455.

Where a state has adopted or derived its rules from the federal rules, a state court, in

construing its own rules, gives great weight to the federal court decisions interpreting the corresponding provisions of the federal rules. *Holyfield v Moates* (Ala) 565 So 2d 186; *State v Haas*, 138 Ariz 413, 675 P2d 673 (superseded by statute on other grounds as stated in *State v Bridgeforth*, 156 Ariz 60, 750 P2d 3, 1 Ariz Adv Rep 32); *Crump v Gold House Restaurants, Inc.* (Fla) 96 So 2d 215, 65 ALR2d 637; *Corder v Corder* (Tex Civ App) 189 SW2d 100, writ ref; *Bayham v Funk*, 3 Ariz App 220, 413 P2d 279; *Davis v Abbuhl* (Dist Col App) 461 A2d 473; *State ex rel. Mississippi Bureau of Narcotics v One Chevrolet Nova Auto.* (Miss) 573 So 2d 787; *Moran v Household International, Inc.* (Del Ch) 490 A2d 1059, affd (Del Sup) 500 A2d 1346, CCH Fed Secur L Rep ¶ 92371; *Jackson v Russell* (Ind App) 491 NE2d 1017; *Smith v Johns-Manville Corp.* (RI) 489 A2d 336; *State v Gray* (Utah) 717 P2d 1313, 31 Utah Adv Rep 31 (criticized on other grounds by *Turner v General Adjustment Bureau* (Utah App) 832 P2d 62, 185 Utah Adv Rep 16); *Hopkinson v State* (Wyo) 679 P2d 1008, cert den 469 US 873, 83 L Ed 2d 157, 105 S Ct 228, habeas corpus proceeding (Wyo) 696 P2d 54, later proceeding (Wyo) 704 P2d 1323, habeas corpus proceeding (Wyo) 708 P2d 46, later proceeding (Wyo) 709 P2d 406, habeas corpus proceeding (DC Wyo) 645 F Supp 374, reconsideration den, stay vac (DC Wyo) 648 F Supp 141 and affd, in part, remanded (CA10 Wyo) 866 F2d 1185, 27 Fed Rules Evid Serv 919, later proceeding (DC Wyo) 1989 US Dist LEXIS 12348, habeas corpus proceeding (Wyo) 798 P2d 1193 and adhered to, by split decision, on reh, en banc (CA10 Wyo) 888 F2d 1286, cert den 497 US 1010, 111 L Ed 2d 765, 110 S Ct 3256, habeas corpus proceeding (Wyo) 798 P2d 1186, later proceeding (Wyo) 798 P2d 1192, habeas corpus den, stay vac, dismd (DC Wyo) 781 F Supp 737, affd (CA10 Wyo) 954 F2d 609, stay den, cert den 502 US 1067, 117 L Ed 2d 125, 112 S Ct 959, related proceeding (Wyo) 851 P2d 1262 and (disapproved on other grounds as stated in *Thomas v Indiana* (CA7 Ind) 910 F2d 1413) and (disapproved on other grounds as stated in *Davis v Maynard* (CA10 Okla) 911 F2d 415) and (criticized on other grounds by *Williams v Dixon* (CA4 NC) 961 F2d 448) and cert den 474 US 1026, 88 L Ed 2d 564, 106 S Ct 582 and cert den 474 US 865, 88 L Ed 2d 155, 106 S Ct 187.

Footnote 66. *Orme Sch. v Reeves*, 166 Ariz 301, 802 P2d 1000, 75 Ariz Adv Rep 5; *High Gear & Toke Shop v Beacom* (Colo) 689 P2d 624; *Palm Beach Junior College Bd. of Trustees v United Faculty of Palm Beach Junior College* (Fla) 475 So 2d 1221, 10 FLW 450, 120 BNA LRRM 3223; *State v Godek*, 182 Conn 353, 438 A2d 114, cert den 450 US 1031, 68 L Ed 2d 226, 101 S Ct 1741; *Cede & Co. v Technicolor* (Del Sup) 542 A2d 1182, motion den (Del Ch) 1989 Del Ch LEXIS 105, later proceeding (Del Ch) 1990 Del Ch LEXIS 259, later proceeding (Del Ch) 1991 Del Ch LEXIS 105 (criticized on other grounds by *Kahn v Lynch Communication Sys.* (Del Sup) 638 A2d 1110) and affd in part and revd in part on other grounds, remanded sub nom *Cede & Co. v Technicolor* (Del Sup) 634 A2d 345, CCH Fed Secur L Rep ¶ 97811, mod, on reh, in part, reh den, in part (Del Sup) 636 A2d 956 and dismd, on remand sub nom *Cinerama, Inc. v Technicolor* (Del Ch) 1994 Del Ch LEXIS 178, affd (Del Sup) 1995 Del LEXIS 251; *Weiner v Kneller* (Dist Col App) 557 A2d 1306; *Smith v Southern Baptist Hosp., Inc.* (Fla App D1) 564 So 2d 1115, 15 FLW D 1654; *State v Hawkins*, 117 Idaho 285, 787 P2d 271; *Graves Trucking, Inc. v B. G. Trucking, Inc.*, 151 Ind App 563, 280 NE2d 834; *State ex rel. Iowa Dep't of Human Services v Duckert* (Iowa) 465 NW2d 871; *Scott v Hospital Service Dist. No. 1* (La) 496 So 2d 270; *Turgut v Levine*, 79 Md App 279, 556 A2d 720; *Commissioner of Corps. & Taxation v Williston*, 315 Mass 648, 54 NE2d 43, 151 ALR 1395; *Shuman v Stanley Works*, 30 Mass App 951, 571 NE2d 633, review den 410 Mass 1103, 576 NE2d 685; *Rasheed v Chrysler Corp.*, 445 Mich 109, 517 NW2d 19; *Johnson v Soo L. R. Co.* (Minn) 463 NW2d 894; *Ganaway v Shelter Mut. Ins. Co.* (Mo App) 795 SW2d 554; *State v Hinton*, 226 Neb 787, 415 NW2d 138; *Otis Elevator Co. v Reid*, 101 Nev 515, 706 P2d 1378, CCH Prod Liab Rep ¶ 10706; *Farmers Union Oil Co. v Harp*

(ND) 462 NW2d 152; *Clapp v Oregonian Pub. Co.*, 83 Or App 575, 732 P2d 928 (criticized on other grounds by *Taal v Union P. R. Co.*, 106 Or App 488, 809 P2d 104); *Sander v Geib, Elston, Frost Professional Ass'n* (SD) 506 NW2d 107; *Henderson v Bush Bros. & Co.* (Tenn) 868 SW2d 236; *Barton v Utah Transit Auth.* (Utah) 872 P2d 1036, 236 Utah Adv Rep 44; *Warren, Little & Lund, Inc. v Max J. Kuney Co.*, 115 Wash 2d 211, 796 P2d 1263; *State v Gore*, 101 Wash 2d 481, 681 P2d 227, 39 ALR4th 975 (superseded by statute on other grounds as stated in *State v Hickok*, 39 Wash App 664, 695 P2d 136); *Weber v Weber*, 176 Wis 2d 1085, 501 NW2d 413; *State v Davidson*, 242 Wis 406, 8 NW2d 275, 145 ALR 1411.

States are free to follow or to disregard principles which have evolved on the basis of decisional law dealing with appeals within the federal court system, where they are not based on any constitutional principle, so long as the state procedure as a whole remains consistent with due process of law. *Fletcher v Weir*, 455 US 603, 71 L Ed 2d 490, 102 S Ct 1309, on remand (CA6 Ky) 680 F2d 437, habeas corpus proceeding (CA6 Ky) 744 F2d 532, cert den 469 US 1223, 84 L Ed 2d 356, 105 S Ct 1215.

But see *University Hospital, Inc. v Massachusetts Com. against Discrimination*, 396 Mass 533, 487 NE2d 506, 40 BNA FEP Cas 225, 43 CCH EPD ¶ 37050, holding that the state courts must follow the federal court's interpretation of the Federal Rules of Civil Procedure in construing the state's rules which were derived from the federal rules, absent a compelling reason or significant difference in content.

Footnote 67. *Clearfield Trust Co. v United States*, 318 US 363, 87 L Ed 838, 63 S Ct 573 (not followed on other grounds by *Powers v United States Postal Serv.* (CA7 Ind) 671 F2d 1041) and (superseded by statute on other grounds as stated in *Pennsylvania, Dep't of Public Welfare v United States* (CA3 Pa) 781 F2d 334) and (not followed on other grounds by *FDIC v Hulsey* (CA10 Okla) 22 F3d 1472, 23 UCCRS2d 596) and (among conflicting authorities on other grounds noted in *United States v Administrative Enters.* (CA7 Ill) 46 F3d 670, 95-1 USTC ¶ 50083, 75 AFTR 2d 95-843).

---

## § 170 Decisions of United States Supreme Court regarding federal law

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

State courts are bound by decisions of the United States Supreme Court as to federal law. 68

A United States Supreme Court decision regarding a question of the construction or application of the Federal Constitution binds all state courts in interpreting and applying federal constitutional law. 69

State courts are also bound by a decision of the United States Supreme Court as to the validity of state statutes under the Federal Constitution. 70

Both summary dismissals 71 and summary affirmances 72 of the United States Supreme Court bind state courts, although they do not have the same precedential value as

opinions treating the question on the merits. 73

A state supreme court is not bound by the decisions of the United States Supreme Court where independent state grounds exist for reaching a contrary result, 74 such that a state court may refuse to follow United States Supreme Court decisions defining fundamental rights where those decisions do not provide as much individual protection as is guaranteed by the particular state's law and constitution. 75

Absent a precedent in the federal jurisdiction, a state court bound to apply a federal statute may construe the statute, 76 but should seek guidance from opinions of the United States Supreme Court in analogous cases. 77

---

## Footnotes

Footnote 68. *South Carolina v Bailey*, 289 US 412, 77 L Ed 1292, 53 S Ct 667 (not followed on other grounds by *State ex rel. Drescher v Hedrick*, 180 W Va 35, 375 SE2d 213); *Chesapeake & O. R. Co. v Martin*, 283 US 209, 75 L Ed 983, 51 S Ct 453; *People v Johnson* (1st Dist) 162 Cal App 3d 1003, 209 Cal Rptr 78; *O'Brien v Howell* (Fla) 92 So 2d 608, 63 ALR2d 544; *Baker v Miller*, 236 Ind 20, 138 NE2d 145, 59 ALR2d 1393; *McNabb v Osmundson* (Iowa) 315 NW2d 9; *State ex rel. Stephan v Finney*, 254 Kan 632, 867 P2d 1034; *Wimberly v Labor & Industrial Relations Com.* (Mo) 688 SW2d 344, cert gr 475 US 1118, 90 L Ed 2d 179, 106 S Ct 1633, motion gr 478 US 1034, 92 L Ed 2d 771, 107 S Ct 19 and motion gr 479 US 806, 93 L Ed 2d 12, 107 S Ct 51 and affd 479 US 511, 93 L Ed 2d 909, 107 S Ct 821, 42 BNA FEP Cas 1261, 41 CCH EPD ¶ 36659; *Walker v Maruffi* (App) 105 NM 763, 737 P2d 544, cert den (May 14, 1987); *State v Moyle*, 299 Or 691, 705 P2d 740; *Standard Oil Co. v Apex Oil Corp.*, 35 Tenn App 225, 244 SW2d 176, 41 AFTR 583, 31 ALR2d 869; *State v Badger*, 141 Vt 430, 450 A2d 336 (criticized on other grounds by *State v Brunelle*, 148 Vt 347, 534 A2d 198).

Footnote 69. *Pennekamp v Florida*, 328 US 331, 90 L Ed 1295, 66 S Ct 1029, 1 Media L R 1294; *State v O'Guinn* (Ala Crim App) 462 So 2d 1052; *Gold Bondholders Protective Council v Atchison, T. & S.F. Ry.* (Alaska) 649 P2d 947, later proceeding (Alaska) 658 P2d 776; *Pool v Superior Court*, 139 Ariz 98, 677 P2d 261; *People v Ramos*, 37 Cal 3d 136, 207 Cal Rptr 800, 689 P2d 430, cert den 471 US 1119, 86 L Ed 2d 266, 105 S Ct 2367; *Lujan v Colorado State Bd. of Education* (Colo) 649 P2d 1005; *Miami Herald Pub. Co. v Ane* (Fla App D3) 423 So 2d 376, ctfd ques ans, approved (Fla) 458 So 2d 239, 9 FLW 366, 10 Media L R 2383 (not followed on other grounds by *Della-Donna v Gore Newspapers Co.* (Fla App D4) 489 So 2d 72, 11 FLW 943, 12 Media L R 2310); *Trinkle v Hand*, 184 Kan 577, 337 P2d 665, cert den 361 US 846, 4 L Ed 2d 85, 80 S Ct 101; *State v Howes* (Me) 432 A2d 419; *Commonwealth v Montanez*, 388 Mass 603, 447 NE2d 660; *Dayton Co. v Carpet, L. & R. F. D. Union*, 229 Minn 87, 39 NW2d 183, 24 BNA LRRM 2228, 16 CCH LC ¶ 65252, app dismd 339 US 906, 94 L Ed 1334, 70 S Ct 570, 25 BNA LRRM 2487, 17 CCH LC ¶ 65642; *Battaglia v Union County Welfare Bd.*, 88 NJ 48, 438 A2d 530, cert den 456 US 965, 72 L Ed 2d 490, 102 S Ct 2045; *In re Holmes' Estate*, 291 NY 261, 52 NE2d 424, 150 ALR 447; *State v McDowell*, 310 NC 61, 310 SE2d 301, later proceeding 476 US 1165, 90 L Ed 2d 732, 106 S Ct 2292, reh den 478 US 1028, 92 L Ed 2d 749, 106 S Ct 3341, habeas corpus proceeding (CA4) 1988 US App LEXIS 8249 and habeas corpus proceeding (CA4 NC) 858 F2d 945, cert den 489 US 1033, 103 L Ed 2d 230, 109 S Ct 1172; *Federal Land Bank v De Rochford*, 69 ND 382, 287 NW 522; *AFL v Bain*, 165 Or 183, 106 P2d 544, 7

BNA LRRM 726, 3 CCH LC ¶ 60111, 130 ALR 1278; *Roy v Brittain*, 201 Tenn 140, 297 SW2d 72; *Swart v South Burlington Town Sch. Dist.*, 122 Vt 177, 167 A2d 514, 81 ALR2d 1300, cert den 366 US 925, 6 L Ed 2d 384, 81 S Ct 1349; *Manlowe Transfer & Distributing Co. v Department of Public Service*, 18 Wash 2d 754, 140 P2d 287, 155 ALR 928; *State ex rel. Battle v B. D. Bailey & Sons, Inc.*, 150 W Va 37, 146 SE2d 686; *State v Johnson*, 133 Wis 2d 207, 395 NW2d 176, post-conviction proceeding (App) 149 Wis 2d 399, 439 NW2d 644 and (criticized on other grounds in *Daniel A. v Walter H.* (Wis App) 1995 Wisc App LEXIS 886).

Footnote 70. *Amalgamated Asso. S., E. R. & M. C. E. v Missouri*, 374 US 74, 10 L Ed 2d 763, 83 S Ct 1657, 53 BNA LRRM 2394, 47 CCH LC ¶ 50839, reh den 375 US 870, 11 L Ed 2d 100, 84 S Ct 29; *Masaoka v People*, 39 Cal 2d 883, 245 P2d 1062; *State ex rel. Stephan v Finney*, 254 Kan 632, 867 P2d 1034; *Santa Rita Oil & Gas Co. v State Bd. of Equalization*, 112 Mont 359, 116 P2d 1012, 136 ALR 757; *People v Davis*, 43 NY2d 17, 400 NYS2d 735, 371 NE2d 456, cert den 435 US 998, 56 L Ed 2d 88, 98 S Ct 1653 and cert den 438 US 914, 57 L Ed 2d 1160, 98 S Ct 3143; *State v Yetter*, 192 SC 1, 5 SE2d 291, 126 ALR 584.

◆ Reminder: Although a state court is bound by the United States Supreme Court's determination that a state statute is unconstitutional under the Federal Constitution, the state court need not hold the statute unconstitutional under the state Constitution. § 169.

Footnote 71. *State v Wanrow*, 91 Wash 2d 301, 588 P2d 1320; *S & S Liquor Mart v Pastore (RI)* 497 A2d 729, 12 Media L R 1236, 1985-2 CCH Trade Cases ¶ 66764.

Footnote 72. *People ex rel. Tooley v Seven Thirty-Five East Colfax, Inc. (Colo)* 697 P2d 348 (among conflicting authorities on other grounds noted in *People v Batchelor (Colo)* 800 P2d 599); *State v Mueller*, 66 Hawaii 616, 671 P2d 1351; *Turpen v Oklahoma Corp. Com. (Okla)* 769 P2d 1309.

Footnote 73. *State v Mueller*, 66 Hawaii 616, 671 P2d 1351; *Turpen v Oklahoma Corp. Com. (Okla)* 769 P2d 1309; *S & S Liquor Mart v Pastore (RI)* 497 A2d 729, 12 Media L R 1236, 1985-2 CCH Trade Cases ¶ 66764.

Footnote 74. *State v Solis*, 214 Mont 310, 693 P2d 518; *State v Badger*, 141 Vt 430, 450 A2d 336 (criticized on other grounds by *State v Brunelle*, 148 Vt 347, 534 A2d 198).

Footnote 75. *Stone v Superior Court*, 31 Cal 3d 503, 183 Cal Rptr 647, 646 P2d 809 (not followed on other grounds by *People v Jordan (1st Dist)* 205 Cal App 3d 505, 252 Cal Rptr 452); *People v Sporleder (Colo)* 666 P2d 135; *State v Marsala*, 216 Conn 150, 579 A2d 58, on remand on other grounds, remanded 26 Conn App 423, 601 A2d 542, on reconsideration 27 Conn App 291, 605 A2d 866, app gr, in part 223 Conn 902, 610 A2d 177 and revd, remanded 225 Conn 10, 620 A2d 1293; *State v Russo*, 67 Hawaii 126, 681 P2d 553, appeal after remand 69 Hawaii 72, 734 P2d 156; *State v Hempele*, 120 NJ 182, 576 A2d 793; *People v Harris*, 77 NY2d 434, 568 NYS2d 702, 570 NE2d 1051; *Direct Plumbing Supply Co. v Dayton*, 138 Ohio St 540, 21 Ohio Ops 422, 38 NE2d 70, 137 ALR 1058.

Footnote 76. *Southwestern Greyhound Lines, Inc. v Railroad Com. of Texas*, 128 Tex 560, 99 SW2d 263, 109 ALR 1235.

---

## § 171 Decisions of federal courts other than United States Supreme Court

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

Some jurisdictions adhere to the view that a state court is not bound by decisions of a federal court other than the United States Supreme Court, even though a federal question is involved. 78 In these jurisdiction such a decision may be persuasive authority, 79 and in at least one jurisdiction, there appears to be support for the proposition that a state court should accept, so far as reasonably possible, the decision of its federal circuit court on a federal question to further harmonious federal-state relations. 80

In contrast, other jurisdictions follow the view that in the absence of an opinion of the United States Supreme Court, a decision of a lower federal court as to federal law is binding on state courts. 81

---

### Footnotes

Footnote 78. *Harrison v State* (Alaska App) 791 P2d 359; *People v Barber* (Colo) 799 P2d 936; *Head v State*, 253 Ga 429, 322 SE2d 228, on remand 173 Ga App 247, 327 SE2d 239; *Porter v Food Giant, Inc.*, 198 Ga App 736, 402 SE2d 766, 102 Fulton County D R 22, cert den (Ga) 1991 Ga LEXIS 717 and cert den 502 US 980, 116 L Ed 2d 607, 112 S Ct 582; *Indiana Dep't of Pub. Welfare v Payne* (Ind) 622 NE2d 461, 42 Soc Sec Rep Serv 519, reh den (Feb 1, 1994); *Smith v United Technologies, Essex Group, Inc., Wire & Cable Div.*, 240 Kan 562, 731 P2d 871, 42 CCH EPD ¶ 36884 (ovrld in part on other grounds by *Coleman v Safeway Stores, Inc.*, 242 Kan 804, 752 P2d 645, 3 BNA IER Cas 170); *Commonwealth v Montanez*, 388 Mass 603, 447 NE2d 660; *Wimberly v Labor & Industrial Relations Com. (Mo)* 688 SW2d 344, cert gr 475 US 1118, 90 L Ed 2d 179, 106 S Ct 1633, motion gr 478 US 1034, 92 L Ed 2d 771, 107 S Ct 19 and motion gr 479 US 806, 93 L Ed 2d 12, 107 S Ct 51 and affd 479 US 511, 93 L Ed 2d 909, 107 S Ct 821, 42 BNA FEP Cas 1261, 41 CCH EPD ¶ 36659; *State ex rel. Schimmer v Wall* (Mo App) 774 SW2d 864; *In re Sinclair*, 197 Mont 29, 640 P2d 918; *Dewey v R.J. Reynolds Tobacco Co.*, 121 NJ 69, 577 A2d 1239, CCH Prod Liab Rep ¶ 12548, related proceeding (App Div) 267 NJ Super 62, 630 A2d 820; *State v McDowell*, 310 NC 61, 310 SE2d 301, later proceeding 476 US 1165, 90 L Ed 2d 732, 106 S Ct 2292, reh den 478 US 1028, 92 L Ed 2d 749, 106 S Ct 3341, habeas corpus proceeding (CA4) 1988 US App LEXIS 8249 and habeas corpus proceeding (CA4 NC) 858 F2d 945, cert den 489 US 1033, 103 L Ed 2d 230, 109 S Ct 1172; *Salem College & Academy, Inc. v Employment Div.*, 298 Or 471, 695 P2d 25; *State v McKay* (Tenn) 680 SW2d 447, cert den 470 US 1034, 84 L Ed 2d 795, 105 S Ct 1412, post-conviction relief dismd (Tenn Crim) 1989 Tenn Crim App LEXIS 153, post-conviction relief den (Tenn Crim) 1995 Tenn Crim App LEXIS 115; *Home Ins. Co. v Northern P. R. Co.*, 18 Wash 2d 798,



140 P2d 507, 147 ALR 849; *State v Mechtel*, 176 Wis 2d 87, 499 NW2d 662.

A ruling by a federal court that does not have constitutional implications does not bind a state court. *People v Finley*, 431 Mich 506, 431 NW2d 19.

A federal district court decision does not bind the state courts unless it is affirmed by the United States Supreme court. *Turpen v Oklahoma Corp. Com. (Okla)* 769 P2d 1309.

A vacated judgment in federal court is not a precedent for a state court. *Department of Pub. Safety v Gates (SD)* 350 NW2d 59.

Footnote 79. *In re Sinclair*, 197 Mont 29, 640 P2d 918; *Investment Co. v Reese*, 117 NM 655, 875 P2d 1086; *Dority v Green Country Castings Corp. (Okla)* 727 P2d 1355, 125 BNA LRRM 2341, 105 CCH LC ¶ 55647; *State v Moyle*, 299 Or 691, 705 P2d 740.

In applying federal law in those instances where the United States Supreme Court has not spoken, the Connecticut court generally gives special consideration to decisions of the Second Circuit Court of Appeals. *Schnabel v Tyler*, 230 Conn 735, 646 A2d 152.

Footnote 80. *Littlefield v State, Dep't of Human Services (Me)* 480 A2d 731.

Footnote 81. *Blue Cross & Blue Shield v King (Ala Civ App)* 532 So 2d 1045; *Darr v Long*, 210 Neb 57, 313 NW2d 215; *Desmarais v Joy Mfg. Co.*, 130 NH 299, 538 A2d 1218; *Hobbs Lumber Co. v Shidell*, 42 Ohio Misc 21, 71 Ohio Ops 2d 135, 326 NE2d 706.

Because the federal judiciary is supreme in interpreting the law under the United States Constitution, the court will not attempt to arrive at its own independent interpretation of the United States Constitution but will follow the federal decisions. *McNabb v Osmundson (Iowa)* 315 NW2d 9.

### **C. Manner And Effect Of Overruling Precedents [172-178]**

#### **Research References**

ALR Digest: Courts §§ 357, 358

ALR Index: Overruled Decisions; Precedents

#### **1. In General [172]**

---

#### **§ 172 Generally**

|   |
|---|
| <p style="text-align: center;"><a href="#">View Entire Section</a><br/><a href="#">Go to Parallel Reference Table</a></p> |
|---|

A state's highest court may overrule precedents established by decisions of intermediate appellate courts, 82 as well as those established by its own prior decision. 83

A court may implicitly overrule a judicial precedent. 84 Accordingly, a later decision overrules prior decisions which conflict with it regardless of whether such prior decisions are mentioned or commented on. 85 However, there is authority for the view that a later decision will not impliedly overrule the principle in a prior case unless the principle is directly involved, and the inference is clear and compelling. 86

---

## Footnotes

Footnote 82. Publix Cab Co. v Colorado Nat'l Bank, 139 Colo 205, 338 P2d 702, 78 ALR2d 198.

Footnote 83. Redwine v Jackson, 254 Ala 564, 49 So 2d 115; People v Vogel, 46 Cal 2d 798, 299 P2d 850; Park v Appeal Bd. of Michigan Employment Sec. Com., 355 Mich 103, 94 NW2d 407, app dismd 360 US 251, 3 L Ed 2d 1253, 79 S Ct 1284; State v Jones, 44 NM 623, 107 P2d 324; Oklahoma County v Queen City Lodge, I. O. O. F., 195 Okla 131, 156 P2d 340; Hungerford v Portland Sanitarium & Benevolent Asso., 235 Or 412, 384 P2d 1009.

Footnote 84. Puget Mill Co. v Kerry, 183 Wash 542, 49 P2d 57, 100 ALR 1220.

Footnote 85. In re Lane, 58 Cal 2d 99, 22 Cal Rptr 857, 372 P2d 897.

Footnote 86. Cole v Cole, 229 NC 757, 51 SE2d 491, 6 ALR2d 1335.

## 2. Retroactive or Prospective Application [173-178]

### a. Civil Actions [173-176]

---

## § 173 Generally

[View Entire Section](#)  
[Go to Parallel Reference Table](#)  
[Go to Supplement](#)

The United States Constitution neither requires nor prohibits retroactive or prospective application of a new decision, 87 and the determination of whether a decision overruling a former decision should be applied retroactively or merely prospectively is generally a matter of judicial discretion to be applied on a case-by-case basis. 88 The general rule in civil cases seems to be that an overruling decision in a civil case will generally apply both prospectively and retroactively, 89 absent a statement in the overruling decision that it is to have only prospective effect, 90 such as where the court explicitly overrules its own past precedent, disapproves a practice that it had previously approved, or overturns a well-established body of lower court authority. 91

Where the United States Supreme Court applies a rule of federal law to the parties before it, that rule is to be given full retroactive effect in all cases still open on direct review and as to all events, regardless of when they occurred. 92

However, a decision overruling a judicial precedent may be limited to prospective application where required by equity or in the interest of justice. 93

Such a limitation may be warranted where: (1) the holding either overrules prior law or decides an issue of first impression the resolution of which was not foreshadowed; (2) prospective application would best accomplish the purpose and intended effect of the new rule of law; (3) the old rule of law has been reasonably relied on; or (4) retroactive application of the new rule of law would impair the administration of justice or produce substantial inequitable results. 94

Where a judicial decision governs only operative events occurring after the date of decision, that decision applies prospectively only. 95

Some jurisdictions distinguish between decisions that overrule substantive law and those that overrule procedural law; in these jurisdictions, a decision overruling substantive law applies retroactively, while a decision overruling procedural law applies prospectively only. 96

Similarly, judicial decisions creating new substantive rights have prospective effect only, whereas judicial decisions creating new remedies to vindicate existing rights are applied retroactively. 97

However, where the effect of a decision overruling a judicial precedent is to shorten the appeal period, the decision will not be given a retroactive effect. 98

◆ Observation: A new rule of constitutional law generally applies prospectively only. 99

---

## § 173 ----Generally [SUPPLEMENT]

**Practice Aids:** Supreme Court's views as to retroactive effect of its own decisions announcing new rules as to taxation. 125 L ED 2d 845.

---

### Footnotes

Footnote 87. American Trucking Ass'ns v Smith, 496 US 167, 110 L Ed 2d 148, 110 S Ct 2323, later proceeding 303 Ark 183, 792 SW2d 616 and (criticized on other grounds by Harper v Virginia Dep't of Taxation (US) 125 L Ed 2d 74, 113 S Ct 2510, 93 CDOS 4491, 93 Daily Journal DAR 7730, 16 EBC 2313, 93 TNT 131-6, 7 FLW Fed S 456); Benyard v Wainwright (Fla) 322 So 2d 473; Kalman v Neuman, 102 Misc 2d 662, 424 NYS2d 649, affd (2d Dept) 80 App Div 2d 116, 438 NYS2d 109 (criticized on other grounds by Knapp v Shoemaker (4th Dept) 82 App Div 2d 15, 442 NYS2d 287); In re McNeely (Okla) 734 P2d 1294; Blackwell v State Ethics Comm'n, 527 Pa 172, 589 A2d 1094; Beitelspacher v Winther (SD) 447 NW2d 347, appeal after remand on other grounds, remanded (SD) 466 NW2d 638.

**Annotation:** Comment Note.—Prospective or retroactive operation of overruling decision, 10 ALR3d 1371.

Footnote 88. *Birmingham v Blount County* (Ala) 533 So 2d 534; *Metcalf v Felec Servs.* (Alaska) 784 P2d 1386; *Haney v Lexington* (Ky) 386 SW2d 738, 10 ALR3d 1362; *Blackwell v State Ethics Comm'n*, 527 Pa 172, 589 A2d 1094; *Huston v Federal Deposit Ins. Corp.* (Tex) 800 SW2d 845.

Footnote 89. *Fain Land & Cattle Co. v Hassell*, 163 Ariz 587, 790 P2d 242, 57 Ariz Adv Rep 19; *County of Los Angeles v Faus*, 48 Cal 2d 672, 312 P2d 680; *Kreisher v Mobil Oil Corporation* (1st Dist) 198 Cal App 3d 389, 243 Cal Rptr 662, reh den (Mar 5, 1988) and review den (May 5, 1988) and cert den 488 US 899, 102 L Ed 2d 233, 109 S Ct 244; *Mickel v New England Coal & Coke Co.*, 132 Conn 671, 47 A2d 187, 171 ALR 1001 (superseded by statute on other grounds as stated in *Enquist v General Datacom*, 218 Conn 19, 587 A2d 1029); *Melendez v Dreis & Krump Mfg. Co.* (Fla) 515 So 2d 735, 12 FLW 519, CCH Prod Liab Rep ¶ 11568; *Pierce v Tee-Pak, Inc.* (4th Dist) 196 Ill App 3d 544, 143 Ill Dec 118, 553 NE2d 1104, app den 133 Ill 2d 572, 149 Ill Dec 336, 561 NE2d 706; *Pharo Distributing Co. v Stahl* (Ky App) 782 SW2d 635, 11 UCCRS2d 814; *Gentzler v Smith*, 320 Mich 394, 31 NW2d 668; *State ex rel. Moore v Molpus* (Miss) 578 So 2d 624; *McCollum v D'Arcy*, 138 NH 285, 638 A2d 797; *Accountemps Div. of Robert Half, Inc. v Birch Tree Group, Ltd.*, 115 NJ 614, 560 A2d 663; *In re McNeely* (Okla) 734 P2d 1294; *American Trucking Ass'ns v Conway*, 152 Vt 363, 566 A2d 1323, companion case 152 Vt 383, 566 A2d 1335; *Burlington Northern, Inc. v Superior* (App) 149 Wis 2d 190, 441 NW2d 234, later proceeding (App) 153 Wis 2d 206, 450 NW2d 486, affd 159 Wis 2d 434, 464 NW2d 643.

The retroactive application of a civil decision does not constitute an unconstitutional ex post facto law. *Abu-Khdeir v T. J. Maxx, Inc.*, 191 Ga App 523, 382 SE2d 216.

An opinion that interprets a preexisting court rule, although under facts which had not previously been the subject of an appellate court decision, should be applied retroactively. *Fetz Engineering Co. v Ecco Systems, Inc.*, 188 Mich App 362, 471 NW2d 85, vacated on other grounds 439 Mich 977, 483 NW2d 619.

The decision of an appellate court modifying or reversing a trial court decision is given retrospective effect to the day of the original judgment. *Gotten v Gotten* (Tenn App) 748 SW2d 430.

Footnote 90. *Hoff v Kempton* (Minn) 317 NW2d 361.

Footnote 91. *Marinez v Industrial Com. of Colorado* (Colo) 746 P2d 552; *Board of Education v Illinois Educational Labor Relations Bd.* (4th Dist) 183 Ill App 3d 972, 132 Ill Dec 319, 539 NE2d 882 (criticized on other grounds as stated in *Central City Educ. Assn., IEA-NEA v Illinois Educational Labor Relations Bd.* (1st Dist) 199 Ill App 3d 559, 145 Ill Dec 648, 557 NE2d 418); *Grigoletti v Ortho Pharmaceutical Corp.*, 118 NJ 89, 570 A2d 903, 62 BNA FEP Cas 1850, 53 CCH EPD ¶ 39735, 115 CCH LC ¶ 56269; *Fitzgerald v Meissner & Hicks, Inc.*, 38 Wis 2d 571, 157 NW2d 595.

A decision should be retroactively applied when the former rule of law is unclear. *Poppleton v Rollins, Inc.*, 226 Mont 267, 735 P2d 286.

Footnote 92. *Harper v Virginia Dep't of Taxation (US)* 125 L Ed 2d 74, 113 S Ct 2510, 93 CDOS 4491, 93 Daily Journal DAR 7730, 16 EBC 2313, 93 TNT 131-6, 7 FLW Fed S 456 (not followed on other grounds by *Beavers v Johnson Controls World Servs.*, 118 NM 391, 881 P2d 1376, 9 BNA IER Cas 1684); *Hagge v Iowa Dep't of Revenue & Fin. (Iowa)* 504 NW2d 448; *Marx v Broom (Miss)* 632 So 2d 1315, 18 EBC 1054.

Footnote 93. *Lowing v Allstate Ins. Co.*, 176 Ariz 101, 859 P2d 724, 147 Ariz Adv Rep 68; *Bassi v Langloss*, 22 Ill 2d 190, 174 NE2d 682, 89 ALR2d 881, on remand (2d Dist) 32 Ill App 2d (abstract) 148, 177 NE2d 10; *Montana Bank, N. A. v Musselshell County Bd. of Comm'rs*, 248 Mont 199, 810 P2d 1192; *New Jersey Election Law Enforcement Com. v Citizens to Make Mayor-Council Government Work*, 107 NJ 380, 526 A2d 1069; *Kadrmaz, Lee & Jackson, P.C. v Bolken (ND)* 508 NW2d 341; *Vogt v Billion (SD)* 405 NW2d 635.

A decision of the Supreme Court overruling a former decision will be given retrospective effect unless compelling reasons exist for limiting the application of the new rule to future cases. *Cox v Haworth*, 304 NC 571, 284 SE2d 322.

Footnote 94. *Truesdell v Halliburton Co. (Alaska)* 754 P2d 236; *Fain Land & Cattle Co. v Hassell*, 163 Ariz 587, 790 P2d 242, 57 Ariz Adv Rep 19; *Woods v Young*, 53 Cal 3d 315, 279 Cal Rptr 613, 807 P2d 455, 91 CDOS 2482, 91 Daily Journal DAR 3964; *Newman v Emerson Radio Corp.*, 48 Cal 3d 973, 258 Cal Rptr 592, 772 P2d 1059, 4 BNA IER Cas 609, 116 CCH LC ¶ 56391; *Disner v United Bank of Cherry Creek, N.A. (Colo App)* 780 P2d 51; *Baker v Shavers, Inc.*, 117 Idaho 696, 791 P2d 1275; *Castaneda v Illinois Human Rights Com.*, 132 Ill 2d 304, 138 Ill Dec 270, 547 NE2d 437, 55 CCH EPD ¶ 40600 (not followed on other grounds by *Land & Lakes Co. v Pollution Control Bd. (3d Dist)* 245 Ill App 3d 631, 616 NE2d 349); *In re Estate of McDowell*, 245 Kan 278, 777 P2d 826; *Line v State*, 173 Mich App 720, 434 NW2d 224, app den 433 Mich 897; *Trans Ucu, Inc. v Director of Revenue (Mo)* 808 SW2d 374; *Orleans v Commercial Union Ins. Co.*, 133 NH 493, 578 A2d 360; *Accountemps Div. of Robert Half, Inc. v Birch Tree Group, Ltd.*, 115 NJ 614, 560 A2d 663; *New Jersey Election Law Enforcement Com. v Citizens to Make Mayor-Council Government Work*, 107 NJ 380, 526 A2d 1069; *Kennecott Copper Corp. v Chavez (App)* 109 NM 439, 786 P2d 53, related proceeding (App) 111 NM 366, 805 P2d 633, related proceeding (App) 113 NM 504, 828 P2d 416, cert den 113 NM 488, 827 P2d 1302; *Kalman v Neuman*, 102 Misc 2d 662, 424 NYS2d 649, affd (2d Dept) 80 App Div 2d 116, 438 NYS2d 109 (criticized on other grounds by *Knapp v Shoemaker (4th Dept)* 82 App Div 2d 15, 442 NYS2d 287); *Fowler v North Carolina Dep't of Crime Control & Public Safety*, 92 NC App 733, 376 SE2d 11, review den 324 NC 577, 381 SE2d 773; *Manning v State ex rel. Department of Pub. Safety (Okla)* 876 P2d 667; *Blackwell v State Ethics Comm'n*, 527 Pa 172, 589 A2d 1094; *Landmark Medical Ctr. v Gauthier (RI)* 635 A2d 1145, summary op at (RI) 14 R.I.L.W. 745; *Larsen v Sioux Falls Sch. Dist. No. 49-5 (SD)* 509 NW2d 703; *Cowell v Leapley (SD)* 458 NW2d 514; *City of Richmond v Blaylock*, 247 Va 250, 440 SE2d 598; *A.B.C.G. Enters. v First Bank Southeast, N.A.*, 184 Wis 2d 465, 515 NW2d 904; *Wyoming State Tax Comm'n v BHP Petroleum Co. (Wyo)* 856 P2d 428.

A decision that imposition of a state property tax on bank shares violated federal law should receive prospective application only, since it overruled the precedent on which the state taxing authorities had relied, was not clearly foreseeable, and established a new rule of law, retroactive application of which would produce substantial inequitable results. *First Bank of Deer Park v Deer Park Independent School Dist. (Tex App Texarkana)* 770

SW2d 849, writ den (Feb 21, 1990) and reh'g of writ of error overr (Apr 4, 1990).

Footnote 95. *American Trucking Assos. v Goldstein*, 312 Md 583, 541 A2d 955.

Footnote 96. *Newberry v St. Louis*, 234 Mo App 104, 109 SW2d 876; *Curtis v Barby* (Okla) 366 P2d 616, 16 OGR 157; *Ashland Oil v Rose*, 177 W Va 20, 350 SE2d 531, app dismd 481 US 1025, 95 L Ed 2d 522, 107 S Ct 1949 and (disapproved on other grounds by *Ashland Oil v Caryl*, 497 US 916, 111 L Ed 2d 734, 110 S Ct 3202); *Fitzgerald v Meissner & Hicks, Inc.*, 38 Wis 2d 571, 157 NW2d 595.

Footnote 97. *Simmons v South Carolina Farm Bureau Mutual Ins. Co.*, 301 SC 267, 391 SE2d 560.

Footnote 98. *Aronson v Congregation Temple De Hirsch* (Fla App D3) 123 So 2d 408, cert dismd (Fla) 128 So 2d 585.

Footnote 99. *Gier v Ninth Judicial Dist. Court*, 106 Nev 208, 789 P2d 1245; *First NH Bank v Town of Windham*, 138 NH 319, 639 A2d 1089.

Prospective application of a decision that declared that a law allowing counties to tax locally assessed property at a lower rate than state assessed property violated the state constitution's prohibition against unequal taxation of property does not violate the Due Process Clause of the Federal Constitution. *Kennecott Corp. v State Tax Comm'n* (Utah) 862 P2d 1348, 224 Utah Adv Rep 38.

---

## § 174 As to pending cases and appeals

[View Entire Section](#)  
[Go to Parallel Reference Table](#)  
[Go to Supplement](#)

Once the court announces a new rule of law, the integrity of judicial review requires application of the new rule to all similar cases pending on review in which the issue had been preserved for appellate review, even if the decision constitutes a clear break with past precedent. <sup>1</sup>

Even where relief is specifically held to be prospective only, the new rule is generally applied retroactively to the particular case in which the new rule of law is being enunciated, <sup>2</sup> and on remand the lower court must apply the new rule adopted on appeal. <sup>3</sup>

However, because equity may require that the party to the case before the court escape application of the rule, <sup>4</sup> a court may apply a ruling purely prospectively, so that it governs only future cases and does not apply to the parties before the court. <sup>5</sup>

---

## § 174 ----As to pending cases and appeals [SUPPLEMENT]

**Practice Aids:** Supreme Court's views as to retroactive effect of its own decisions announcing new rules as to taxation. 125 L ED 2nd 845.

---

## Footnotes

Footnote 1. Kaatz v State (Alaska) 540 P2d 1037, appeal after remand (Alaska) 572 P2d 775, later proceeding (Alaska) 685 P2d 1225 and (criticized on other grounds by Carlotta v Warner (ED Ky) 601 F Supp 749); State v Royer (Iowa) 436 NW2d 637; State v Waterberry, 248 Kan 169, 804 P2d 1000; American Trucking Assos. v Goldstein, 312 Md 583, 541 A2d 955.

Footnote 2. Jones v Hansen, 254 Kan 499, 867 P2d 303; American Trucking Ass'ns v Conway, 152 Vt 363, 566 A2d 1323, companion case 152 Vt 383, 566 A2d 1335.

Footnote 3. Rohrsen v Waco Scaffold & Shoring Co. (Fla) 355 So 2d 770; Miller v Pool & Canfield, Inc. (Mo App) 800 SW2d 120.

Where a change in law occurs by court decision between the time of the trial court ruling and the time of the appeal, the appellate court applies the law prevailing at the time of the appellate disposition. Bank of Hawaii v Davis Radio Sales & Serv., 6 Hawaii App 469, 727 P2d 419, 2 UCCRS2d 1459.

Footnote 4. Metcalf v Felec Servs. (Alaska) 784 P2d 1386.

Footnote 5. Midland Bank & Trust Co. v Olsen (Tenn) 717 SW2d 580, cert den 479 US 1103, 94 L Ed 2d 186, 107 S Ct 1336.

---

## § 175 As to decisions changing construction of statute

[View Entire Section](#)  
[Go to Parallel Reference Table](#)  
[Go to Supplement](#)

A decision that overrules the judicial interpretation of a statute generally has only prospective effect equal to the effect ordinarily inherent in a legislative change of a statutory rule, 6 except where the overruling decision declares the statute unconstitutional, in which case the decision may be applied retroactively, 7 to the statute's effective date. 8

This rule does not apply where the legislature has amended the underlying statute and has effectively overruled the decision. 9

---

## § 175 ----As to decisions changing construction of statute [SUPPLEMENT]

**Practice Aids:** Supreme Court's views as to retroactive effect of its own decisions announcing new rules as to taxation. 125 L ED 2nd 845.

---

## Footnotes

Footnote 6. *Camaj v S S Kresge Co.*, 426 Mich 281, 393 NW2d 875; *Continental Supply Co. v Abell*, 95 Mont 148, 24 P2d 133.

Footnote 7. *Cassidy v Firestone Tire & Rubber Co.* (Fla App D1) 495 So 2d 801, 11 FLW 2023, review den (Fla) 506 So 2d 1040 and cert den and app dismd 484 US 802, 98 L Ed 2d 10, 108 S Ct 45; *People v Gersch*, 135 Ill 2d 384, 142 Ill Dec 767, 553 NE2d 281; *Harvest Queen Mill & Elevator Co. v Sanders*, 189 Kan 536, 370 P2d 419, 17 OGR 6, 6 ALR3d 962.

In deciding whether to give retroactive application to a holding that declares an act void or unconstitutional, the court must consider matters of public policy. *Ex parte Coker* (Ala) 575 So 2d 43, supp op (Ala) 1991 Ala LEXIS 176.

Footnote 8. *Shaw v General Motors Corp.* (Fla App D3) 503 So 2d 362, 12 FLW 487, substituted op (Fla App D3) 12 FLW 847 and approved (Fla) 518 So 2d 900, 12 FLW 600.

Footnote 9. *Haynes v Commercial Fisheries Entry Comm'n* (Alaska) 746 P2d 892.

---

## § 176 Where vested rights are affected

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

The judicial overruling of a precedent should not be given retroactive effect where to do so would interfere with vested rights, such as contractual rights. 10

However, this rule does not apply where a party acquiring a right through a contract has not relied on the overruled precedent. 11

---

## Footnotes

Footnote 10. *Goodyear Tire & Rubber Co. v J. M. Tull Metals Co.* (Ala) 629 So 2d 633, reh den, without op (Ala) 1993 Ala LEXIS 1310; *O'Malley v Sims*, 51 Ariz 155, 75 P2d 50, 115 ALR 634; *Mickel v New England Coal & Coke Co.*, 132 Conn 671, 47 A2d 187, 171 ALR 1001 (superseded by statute on other grounds as stated in *Enquist v General Datacom*, 218 Conn 19, 587 A2d 1029); *Aronson v Congregation Temple De Hirsch* (Fla App D3) 123 So 2d 408, cert dismd (Fla) 128 So 2d 585; *Julian v Christopher*, 320 Md 1, 575 A2d 735; *Hanks v McDanell*, 307 Ky 243, 210 SW2d 784, 17 ALR2d 1; *Gentzler v Smith*, 320 Mich 394, 31 NW2d 668; *State ex rel. Midwest Pipe & Supply Co. v Haid*, 330 Mo 1093, 52 SW2d 183; *Pabon v Hackensack Auto Sales, Inc.*, 63 NJ Super 476, 164 A2d 773; *Brown v Utica Mut. Ins. Co.*, 184 Misc 693, 53 NYS2d 760, 10 CCH LC ¶ 62703; *Linn County v Rozelle*, 177 Or 245, 162 P2d 150.



Footnote 11. In re Bray's Estate, 257 Wis 507, 44 NW2d 245, reh den 257 Wis 509a, 45 NW2d 72.

## **b. Criminal Cases [177, 178]**

---

### **§ 177 Generally**

[View Entire Section](#)  
[Go to Parallel Reference Table](#)

A state court has discretion to determine whether an overruling decision that establishes a new rule of criminal procedure should be applied prospectively or retroactively. 12

An overruling decision has only prospective application where the decision imposes a new primary rule of conduct or obligation on the defendant, the defendant was not aware of the rule at the time of the relevant events, and the new rule was not clearly foreshadowed by prior developments. 13

Although the United States Constitution neither prohibits a court from giving, nor requires it to give, retroactive application to criminal law decisions, 14 in a rare case the retroactive application of a judicial decision may violate due process, 15 such as where the decision rendered criminal conduct which was not criminal when it occurred. 16

Thus, when a court overrules a prior decision so as to enlarge the scope of criminal liability, due process requires that the new rule be applied prospectively only. 17

In contrast, full retroactive effect may be given to a decision overruling precedential criminal law where the trial court's action was without jurisdiction or void because the defendant's conduct was not subject to criminal sanction. 18

At least one jurisdiction has determined that the judicial overruling of a prior decision and the application of the new precedent does not constitute a constitutionally improper ex post facto law. 19

A decision overruling a criminal precedent has prospective effect from the date the decision was issued, and not from the date the case was published in a bound volume. 20

Generally, new constitutional rules of criminal procedure apply only to those cases which are pending on direct review or which are not yet final when the new rules are announced. 21

New rules that apply to cases still pending include changing the standard instruction concerning the insanity defense 22 and establishing joint trial rules where the confession of each defendant implicates the other. 23

A new constitutional rule established by the United States Supreme Court for conducting criminal prosecutions is to be applied to all state cases which are pending on direct review or not yet final at the time the new rule is announced, even though the new rule explicitly overrules past precedent of the Supreme Court, disapproves a practice which the Supreme Court has arguably sanctioned in prior cases, or overturns a longstanding practice that lower courts have uniformly approved. 24

Where application of the new rule to a pending case would be inherently offensive to the principles of justice, the court may apply to that case the former, erroneous rule. 25

---

## Footnotes

Footnote 12. *AT & T Communications of Mountain States v State Bd. of Equalization (Wyo)* 768 P2d 580.

**Annotation:** Comment Note.—Prospective or retroactive operation of overruling decision, 10 ALR3d 1371.

Footnote 13. *Cain v McKinnon (Miss)* 552 So 2d 91.

Footnote 14. *Tehan v United States*, 382 US 406, 15 L Ed 2d 453, 86 S Ct 459, 8 Ohio Misc 81, 35 Ohio Ops 2d 391, reh den 383 US 931, 15 L Ed 2d 850, 86 S Ct 925 and (criticized on other grounds as stated in *State v Jackson (La)* 480 So 2d 263) and (criticized on other grounds by *Harper v Virginia Dep't of Taxation (US)* 125 L Ed 2d 74, 113 S Ct 2510, 93 CDOS 4491, 93 Daily Journal DAR 7730, 16 EBC 2313, 93 TNT 131-6, 7 FLW Fed S 456); *Powell v State (Ind App)* 574 NE2d 331, transfer den (Feb 14, 1992); *State v Monroe (Iowa)* 236 NW2d 24; *State v St. Pierre (La)* 515 So 2d 769; *Kerns v Grammer*, 227 Neb 165, 416 NW2d 253.

Footnote 15. *Aue v Diesslin (Colo)* 798 P2d 436, reh den (Colo) 1990 Colo LEXIS 739.

Footnote 16. *State v Koonce*, 89 NJ Super 169, 214 A2d 428.

Footnote 17. *State v Henderson*, 50 Wash App 158, 747 P2d 504, review gr 110 Wash 2d 1027 and affd 114 Wash 2d 867, 792 P2d 514.

Footnote 18. *State v Jones (SC)* 439 SE2d 282.

Footnote 19. *Salt Lake City v Womack (Utah)* 747 P2d 1039, 71 Utah Adv Rep 37.

Footnote 20. *People v Harding*, 443 Mich 693, 506 NW2d 482.

Footnote 21. *Williams v State (Fla App D3)* 366 So 2d 817, cert den (Fla) 375 So 2d 912; *Powell v State (Ind App)* 574 NE2d 331, transfer den (Feb 14, 1992).

Where a new rule serves to ensure criminal defendants a fair trial, it must be retroactively applied at least in a case which was not finally disposed of at the time that rule was announced, provided that the defendant raised the point in the trial court. *Farleigh v Anchorage (Alaska)* 728 P2d 637.

Footnote 22. *Brumley v Commonwealth* (Ky) 375 SW2d 270.

Footnote 23. *People v Charles*, 66 Cal 2d 330, 57 Cal Rptr 745, 425 P2d 545, cert den 389 US 872, 19 L Ed 2d 153, 88 S Ct 159.

Footnote 24. *Powell v Nevada* (US) 128 L Ed 2d 1, 114 S Ct 1280, 94 CDOS 2199, 94 Daily Journal DAR 4109, 8 FLW Fed S 21; *Griffith v Kentucky*, 479 US 314, 93 L Ed 2d 649, 107 S Ct 708, on remand (CA10 Okla) 817 F2d 674; *State v Odiaga*, 125 Idaho 384, 871 P2d 801, cert den (US) 130 L Ed 2d 321, 115 S Ct 369.

But see *People v Carrera*, 49 Cal 3d 291, 261 Cal Rptr 348, 777 P2d 121, mod on other grounds 49 Cal 3d 956a and reh den, stay gr (Cal) 1990 Cal LEXIS 658 and cert den 495 US 911, 109 L Ed 2d 301, 110 S Ct 1938, holding that the rule of retroactivity that the United States Supreme Court decreed for new rules of criminal procedure as a matter of federal constitutional law does not affect the rule of retroactivity employed by the state courts for rules of criminal procedural law founded on state constitutional or statutory law.

Footnote 25. *People v Robinson* (2nd Dist) 229 Cal App 3d 1620, 281 Cal Rptr 26, 91 CDOS 3472, 91 Daily Journal DAR 5513, review den (holding in a robbery prosecution that the trial court did not err in giving a jury instruction which the state supreme court had held erroneous, because the only reason the case had not become final at the time of the ruling was that defendant had absconded).

---

## § 178 Extent of retroactive application

[View Entire Section](#)  
[Go to Parallel Reference Table](#)  
[Go to Supplement](#)

Generally, a new constitutional rule of criminal procedure under the United States Constitution does not apply to those cases which have become final before the new rule is announced, <sup>26</sup> unless the rule (a) places a class of conduct beyond the power of the state to proscribe or addresses a substantive categorical guarantee accorded by the United States Constitution, or (b) is a watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding. <sup>27</sup>

The fact that a rule may have some impact on the accuracy of a trial does not compel a finding of retroactivity. <sup>28</sup>

Instead, the decision in question must affect a change in the law which is designed to overcome an aspect of criminal trial that substantially impairs its truthfinding function and thus raises serious questions about the accuracy of guilty verdicts in past trials. <sup>29</sup>

In some jurisdictions, in deciding the extent to which a decision announcing a new rule of criminal procedure should be given retroactive effect, the court weighs: (1) the purpose to be served by the new standards; (2) the extent of the reliance by law enforcement authorities on the old standards; and (3) the effect on the administration of justice of a

retroactive application of the new standards. 30

Prospective-only application may be appropriate where retroactive application would be an onerous burden to the legal system. 31

Decisions overruling a precedent which concerned the burden of proof have been afforded complete retroactive effect, 32 while changes in sentencing guideline case law, such as those that disapprove reasons for departure previously considered acceptable, generally are not retroactive. 33

---

## **§ 178 ----Extent of retroactive application [SUPPLEMENT]**

### **Case authorities:**

Retroactive application of *Cruz v New York*, 481 US 186, which forbids admission into evidence of incriminating confession of nontestifying codefendant, regardless of whether limiting instruction is issued or whether defendant's own confession was admitted, is constitutionally commanded on collateral review of conviction, since such rule is central to accurate determination of guilt or innocence. *People v Eastman* (1995) 85 NY2d 265, 624 NYS2d 83, 648 NE2d 459.

---

### **Footnotes**

Footnote 26. *Teague v Lane*, 489 US 288, 103 L Ed 2d 334, 109 S Ct 1060, reh den 490 US 1031, 104 L Ed 2d 206, 109 S Ct 1771, post-conviction proceeding (1st Dist) 228 Ill App 3d 855, 171 Ill Dec 48, 593 NE2d 868; *Flamer v State* (Del Sup) 585 A2d 736, habeas corpus proceeding (DC Del) 774 F Supp 211, reh den (DC Del) 1991 US Dist LEXIS 13966, summary judgment gr, habeas corpus den (DC Del) 827 F Supp 1079.

Footnote 27. *Saffle v Parks*, 494 US 484, 108 L Ed 2d 415, 110 S Ct 1257, reh den 495 US 924, 109 L Ed 2d 322, 110 S Ct 1960 and on remand, en banc (CA10 Okla) 925 F2d 366, cert den 502 US 874, 116 L Ed 2d 171, 112 S Ct 213, reh den 502 US 1001, 116 L Ed 2d 648, 112 S Ct 627, habeas corpus proceeding, stay den (CA10 Okla) 958 F2d 989, stay den, cert den 503 US 928, 117 L Ed 2d 530, 112 S Ct 1310; *State v Austin* (Fla App D5) 532 So 2d 19, 13 FLW 2056, review den (Fla) 537 So 2d 568; *State v Neer*, 247 Kan 137, 795 P2d 362; *Commonwealth v Bray*, 407 Mass 296, 553 NE2d 538; *State v Neal* (Okla Crim) 604 P2d 145.

Footnote 28. *Allen v Hardy*, 478 US 255, 92 L Ed 2d 199, 106 S Ct 2878 (criticized on other grounds as stated in *Procter v Butler* (CA5 La) 831 F2d 1251).

Footnote 29. *State v Garcia* (App) 152 Ariz 245, 731 P2d 610 (disapproved on other grounds by *State v Slemmer*, 170 Ariz 174, 823 P2d 41, 102 Ariz Adv Rep 11); *State v St. Pierre* (La) 515 So 2d 769.

Where the new rule has as its purpose preserving the factfinding process from unreliably obtained information bearing directly and substantially on the defendant's guilt or innocence, the rule should be applied retroactively, whether on direct review or in

collateral proceedings. *People v Laffman* (1st Dept) 161 App Div 2d 111, 554 NYS2d 840.

Footnote 30. *People v Cantu* (5th Dist) 161 Cal App 3d 259, 207 Cal Rptr 460; *State v Ikezawa*, 75 Hawaii 210, 857 P2d 593; *Powell v State* (Ind App) 574 NE2d 331, transfer den (Feb 14, 1992); *Kerns v Grammer*, 227 Neb 165, 416 NW2d 253; *Cowell v Leapley* (SD) 458 NW2d 514; *State v Camarillo*, 54 Wash App 821, 776 P2d 176, review gr 113 Wash 2d 1023, 782 P2d 1070 and affd 115 Wash 2d 60, 794 P2d 850.

Footnote 31. *Wiggins v State*, 275 Md 689, 344 A2d 80.

Footnote 32. *State v Monroe* (Iowa) 236 NW2d 24; *State v Garcia* (App) 152 Ariz 245, 731 P2d 610 (disapproved on other grounds by *State v Slemmer*, 170 Ariz 174, 823 P2d 41, 102 Ariz Adv Rep 11).

Footnote 33. *Dupont v State* (Fla App D2) 514 So 2d 1159, 12 FLW 2552, appeal after remand (Fla App D2) 561 So 2d 460, 15 FLW D 1379; *Huffman v State* (Tex App El Paso) 775 SW2d 653, petition for discretionary review ref (Mar 14, 1990) and motion for rehearing on PDR denied (Apr 18, 1990).